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Of Diaries and Data Banks: Use Restrictions Under the Fourth Amendment

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The Supreme Court has dramatically curtailed protection for individual privacy under the Fourth Amendment. Contemporary decisions have restricted the warrant requirement,[1] eased the government's burden of justifying searches and seizures,[2] narrowed the definition of both searches[3] and seizures,[4] and constrained the ability of individuals to challenge government searches.[5]

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1. *See, e.g.*, Minnesota v. Dickerson, 113 S. Ct. 2130, 2136-37 (1993) (upholding a warrantless search when the investigating officer can determine from "plain feel" that an item is contraband); Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 633 (1989) (upholding a warrantless search of the blood and urine of employees in the vicinity of a train crash); Griffin v. Wisconsin, 483 U.S. 868, 872 (1987) (upholding a warrantless search of a probationer).

2. *See, e.g.*, Vernonia Sch. Dist. 47J v. Acton, 115 S. Ct. 2386, 2396 (1995) (upholding a school district's policy of random, suspicionless drug testing of athletes); National Treasury Employees Union v. Von Raab, 489 U.S. 656, 679 (1989) (upholding a Customs Service regulation requiring employees to submit to urinalysis in order to protect the government's interest in securing its borders); *Skinner*, 489 U.S. at 633 (upholding warrantless searches to protect the government's interest in deterring drug- and alcohol-related mass-transit accidents).

3. *See, e.g.*, Florida v. Riley, 488 U.S. 445, 450 (1989) (finding that aerial surveillance from a helicopter at an altitude of 400 feet is not a search); United States v. Place, 462 U.S. 696, 707 (1983) (holding that a sniff of a suitcase in an airport by a law enforcement agency's dog is not a search); United States v. Knotts, 460 U.S. 276, 284-85 (1983) (finding that attachment of a tracing device to an item purchased by a suspect does not constitute a search).

4. Florida v. Bostick, 501 U.S. 429 (1991) (finding that no seizure occurred when law enforcement authorities questioned a passenger sitting in a parked bus, preventing its departure).

5. Rawlings v. Kentucky, 448 U.S. 98, 105-06 (1980) (finding that a defendant lacked standing to challenge the seizure of drugs that he had placed in his companion's purse); Rakas v. Illinois, 439 U.S. 128, 148 (1978) (holding that passengers in a car lacked standing to challenge a search of a car that they did not own); United States v. Phibbs, 999 F.2d 1053, 1077-78 (6th Cir. 1993) (finding no legitimate expectation of privacy in credit-card statements and phone records held by third-party businesses), *cert. denied*, 114 S. Ct. 1071 (1994); United States v. Judd, 889 F.2d 1410, 1413 (5th Cir. 1989) (ruling that a company's vice president lacked standing to object to a search of the company bookkeeper's office), *cert. denied*, 494 U.S. 1036 (1990).

Many academics have decried the Rehnquist Court's assault on privacy, urging more vigorous protection for individuals subject to government searches and seizures.[6] Others have been more accepting, noting that activist review under the Fourth Amendment threatens a return to the discredited *Lochner*-era review of substantive due process claims.[7] Still others have argued that privacy is too malleable a concept to occupy the core of the Fourth Amendment.[8] And many have openly welcomed the diminished protection for privacy because of the public's countervailing interest in safety.[9]

But before jettisoning privacy as the touchstone of Fourth Amendment protections, we should consider its dimensions more fully. Concern for individual privacy has too often ended with the government's search for and seizure of evidence. Little attention has focused on what law enforcement officers can do with property and information after a legitimate search and seizure. Senator Packwood's diaries may have been a legitimate target for discovery by law enforcement authorities,[10] but should the authorities then be able to disseminate copies of the diaries to the news media?[11] Can government administrative authorities release information legitimately seized from a company during a regulatory search

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6. *See, e.g.*, Phyllis T. Bookspan, *Reworking the Warrant Requirement: Resuscitating the Fourth Amendment*, 44 VAND. L. REV. 473, 514-29 (1991) (arguing that all warrantless searches should be presumptively unreasonable except in exigent circumstances); Lewis R. Katz, *In Search of a Fourth Amendment for the Twenty-first Century*, 65 IND. L.J. 549, 554 (1990) (arguing that the Supreme Court's focus on combatting crime has slighted the magnitude of privacy interests implicated); Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 198, 201 (1993) (arguing that the Supreme Court has ignored the central meaning of the Fourth Amendment, which is "distrust of public power and discretion").

7. *See* William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1047 (1995) ("[O]pen-ended judicial balancing of privacy interests against the government's regulatory needs . . . is akin to what courts did in the *Lochner* era.").

8. *See* Scott E. Sundby, *"Everyman"'s Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?*, 94 COLUM. L. REV. 1751, 1754 (1994) (positing that "a reliance on 'the right to be let alone' as the Amendment's basic defining value . . . no longer adequately defines the proper limits on government intrusions"); Morgan Cloud, *The Fourth Amendment During the* Lochner *Era: Liberty, Privacy, and Property in Constitutional Theory*, 48 STAN. L. REV. (forthcoming 1996) (arguing for a return to a property-based rights theory of the Fourth Amendment); *cf.* Louis M. Seidman, *The Problems with Privacy's Problem*, 93 MICH. L. REV. 1079, 1092 (1995) ("The problem . . . is not about informational privacy.").

9. In advocating warrantless searches of apartments in public housing projects, President Bill Clinton has explained that victims "have certain rights we are letting slip away. They include the right to go out to the playground, and the right to sit by an open window; the right to walk to the corner without fear of gunfire; the right to go to school safely in the morning . . . ." Gwen Ifill, *Clinton Asks Help on Police Sweeps in Public Housing*, N.Y. TIMES, Apr. 17, 1994, at A1, A18.

10. *See* Senate Select Comm. on Ethics v. Packwood, 845 F. Supp. 17 (D.D.C.) (upholding a subpoena for Senator Packwood's diaries because they might have contained entries dealing with alleged misconduct), *stay denied*, 114 S. Ct. 1036 (1994).

11. Disclosure to the press likely irreparably damaged Senator Packwood's standing in the community. *See* Timothy Egan, *Packwood is Leaving as a Pariah in His State*, N.Y. TIMES, Sept. 9, 1995, at 8.

to its customers or competitors?[12] Similarly, although the government may have a valid interest in requiring hospitals to extract a blood sample from newborns to test for genetic defects, can the government then analyze the blood for its DNA characteristics and store that information in a law enforcement data bank?[13] Rapidly developing technology has thrust the use issue to the forefront: what the government does with information may now threaten privacy more than the collection itself.

My thesis is that the reasonableness of a seizure extends to the uses that law enforcement authorities make of property and information even after a lawful seizure.[14] Just as the government cannot auction off or use a car that is not an instrumentality of a crime (or subject to forfeiture),[15] so it should not be able to divulge trade secrets to a competitor or the diary of a suspect to *People* magazine. If the state can obtain the information only through means constituting a search or seizure,[16] then use restrictions should apply, confining the governmental authorities to uses consistent with the Amendment's reasonableness requirement.[17] Control over private information is one of the most fundamental attributes of any notion of privacy,[18] and although privacy may not be the only value underlying the

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12. *See infra* text accompanying notes 116-20.

13. Congress recently passed a law authorizing the expenditure on an average of $8 million for each of the next five years to aid states in the establishment and operation of DNA data banks. DNA Identification Act of 1994, Pub. L. No. 103-322, § 210302, 1994 U.S.C.C.A.N. (108 Stat.) 2065, 2068 (to be codified at 42 U.S.C. § 13701).

14. In this Article, I will not directly address the Court's current definition of a seizure. It may be, for instance, that most, if not all, governmental acquisition of information should be considered a search or seizure, even if almost all such acquisition efforts are ultimately deemed reasonable. Indeed, not only governmental acquisition of information but also each separate governmental use of information may constitute a seizure of a person's effects because governmental use deprives a person of control over private information. *See infra* note 199. But whatever definition of a seizure one employs, my principal contention is that the government can only use property and information obtained through searches and seizures in ways consistent with the reasonableness requirement in the Fourth Amendment.

15. *See infra* text accompanying notes 77-97.

16. Almost all recognized searches and seizures include application of government coercion. Many involve physical force, whether by physically carting off goods or by stopping a car. Other searches involve invasive techniques, such as recording conversations. For convenience, I use coercion to refer to all governmental efforts to obtain information that are governed by the Fourth Amendment, whether involving physical force or more subtle techniques.

17. This is not to suggest that law enforcement officials can never deploy data banks to aid criminal investigations. The mark of a successful investigation, after all, is the creative reassembling of available information, which is often obtained in ways other than through searches and seizures.

18. There are of course many aspects of privacy, some of which are not protected by law. In focusing on the privacy protected under the Fourth Amendment, I am concerned primarily with individuals' control over intimate details about their lives, a facet of privacy that has long been recognized, even if its scope remains controversial. *See generally* DAVID H. FLAHERTY, PROTECTING PRIVACY IN SURVEILLANCE SOCIETIES (1989) (evaluating the data protection laws of five Western nations to determine the level of privacy protection provided to the citizens of each country); ALAN F. WESTIN, PRIVACY AND FREEDOM (1967) (examining the effects of technological and scientific advances on the right of privacy); Charles Fried, *Privacy*, 77 YALE L.J. 475 (1968) (examining why people value privacy and why it should assume a high status in society); Ruth Gavison, *Privacy and the Limits*

Fourth Amendment,[19] it should continue to play a pivotal role in shaping search and seizure doctrine.

In Part I, I first canvass the evolution of Fourth Amendment jurisprudence from a property- to a privacy-based system. The Warren Court transformed a property-based search and seizure scheme, designed primarily to protect citizens' rights in tangible property, to a privacy-based model, designed to protect reasonable expectations of privacy regardless of any property right recognized at common law.[20] By abandoning the property basis of the Fourth Amendment, the Warren Court broadened the ability of law enforcement authorities to search for more items. Authorities can now seek not only contraband and instrumentalities of crime, but also "mere evidence" to help inculpate a suspect, irrespective of any superior possessory interest held by the owner of the property.[21] In light of the government's numerous legitimate reasons to collect information, the Court also authorized searches for evidence of compliance with regulatory requirements.[22] The Warren Court model increased protection for individuals' expectations of privacy, yet decreased protection for property rights *per se*.

In Part II, I suggest that the transformation should presage a change in the way we view the subsequent use of property and information obtained through a search or seizure. Currently, under Rule 41(e) of the Federal Rules of Criminal Procedure, federal law enforcement authorities must return property to an owner even after a legitimate seizure unless the property is contraband or an instrumentality of crime. Governmental personnel enjoy the authority to seize property not because they acquire title to it but because the government has a legitimate interest in using the

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of Law, 89 YALE L.J. 421, 423 (1980) (linking privacy "to our concern over our accessibility to others"); John Shattuck, *In the Shadow of* 1984*: National Identification Systems, Computer Matching, and Privacy in the United States*, 35 HASTINGS L.J. 991 (1984) (describing the privacy implications of current technological developments in both the public and private sectors).

19. Professors Seidman and Stuntz have argued persuasively that protecting informational privacy conflicts with presuppositions of the welfare state. Seidman, *supra* note 8, at 1084-92; Stuntz, *supra* note 7, at 1029-34. Despite the tension, I remain convinced that the Supreme Court's Fourth Amendment jurisprudence should be guided at least in part by an individual's interest in controlling personal information, whether for reasons of privacy or dignity. *See infra* notes 197-99 and accompanying text.

20. Thus, the Court protected the privacy of individuals while they were talking from a public phone booth, see Katz v. United States, 389 U.S. 347, 352 (1967), storing records in areas available to employers, see Mancusi v. DeForte, 392 U.S. 364, 369 (1968), and staying overnight in a friend's apartment, see Minnesota v. Olson, 495 U.S. 91, 100 (1990).

21. *See* Warden v. Hayden, 387 U.S. 294, 306-07 (1967) ("The requirements of the Fourth Amendment can secure the same protection of privacy whether the search is for 'mere evidence' or for fruits, instrumentalities or contraband.").

22. *See, e.g.*, See v. City of Seattle, 387 U.S. 541, 545 (1967) (approving inspections under a fire code when ordered by the appropriate administrative agency); Camara v. Municipal Court, 387 U.S. 523 (1967) (suggesting that routine inspection pursuant to a housing ordinance could be based on less than probable cause).

property for a public purpose, whether for criminal law enforcement or for administrative regulation. Once that public purpose ceases, authorities must return the property. Viewed another way, retention of property becomes unreasonable once the need for the property is no longer pressing.

I next argue that a reasonable seizure should similarly include use restrictions on information uncovered. Developments in public and private law have increasingly recognized the importance of protecting private information. Individuals enjoy a protectible interest in information pertaining to themselves, as well as in tangible property. For instance, the Privacy Act[23] at the federal level, and the evolving tort of invasion of privacy at common law,[24] mark enhanced protection for personal privacy. Just as a reasonable seizure should not permanently deprive an individual of control over a car or overcoat, it should not divest individuals of control over information about themselves, whether found in a diary or in a urine sample. The government does not magically acquire title to that information by virtue of a constitutionally permissible seizure. Reasonableness under the Fourth Amendment, therefore, should include constraints on public officials' discretion in using information, as well as physical property, if the government obtained the information or property from individuals through coercion.[25]

The reasonableness inquiry might take several forms. For instance, post-seizure uses of seized information could be subject to case-by-case balancing, or subsequent uses for future criminal law enforcement purposes might be considered categorically reasonable. Despite the existence of these plausible alternatives, I argue in Part III that substantial policy considerations support a ban on all subsequent uses not disclosed or implicit at the time of the underlying seizure. Requiring that the state precommit to all uses of information and items seized constrains arbitrary governmental conduct in an era of expanding searches and seizures. Governmental officials may, as technology changes, acquire increasing amounts of information about individuals, but the Fourth Amendment should at least limit the government's discretion to use information that officials can only obtain through the exercise of coercion.

Finally, in Part IV, I apply my theory to two areas of particular concern: data banks and administrative searches. I conclude that governmental authorities' ability to use information obtained through coercion should be sharply curtailed, unless we as a society are willing to tolerate a substantially diminished sphere of protected privacy.

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23. 5 U.S.C. § 552a (1994) (prohibiting certain uses of private information in the government's possession and allowing individuals to inspect and correct information in the government's files).

24. RESTATEMENT (SECOND) OF TORTS § 652A (1976).

25. If each governmental use of information about an individual constitutes a separate seizure of that person's effects, then all such uses must satisfy the reasonableness requirement. *See infra* note 199.

I. Evolution from Property- to Privacy-Based Analysis

Although courts and commentators have ignored the temporal component of seizures, the question of subsequent use could only have arisen within the last twenty-five years. Prior to that time, with few exceptions, the government could seize goods and information from individuals solely when it could assert a greater possessory interest in the materials.[26] Because the government could claim title to virtually all items it wished to seize—assuming the items were contraband or instrumentalities of crime—[27] it enjoyed near plenary authority to dispose of seized goods or to disseminate any uncovered information.

In the first part of this century, the Supreme Court's Fourth Amendment jurisprudence revolved around a property axis. The Court extended the Fourth Amendment's protection to interests that traditionally had been identified as personal property; property rights served as a proxy for the interests protected under the Fourth Amendment.[28] The Court did not respect interests in control over private information or in the privacy of relationships. Once a property interest had been identified, however, the Court protected that interest extensively from government interference. Because the government could only acquire items and information over which it could demonstrate a superior possessory interest, no one could challenge the government's use of the seized items after the seizure had been deemed lawful.

A. The Property Foundation of Pre-Warren Court Fourth Amendment Jurisprudence

The Supreme Court's early cases on wiretapping illustrate the property-driven analysis of the Fourth Amendment prior to the Warren Court. Courts would not conclude that a search or seizure had even taken place unless the government infringed a property interest. In *Olmstead v.*

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26. *See infra* notes 42-45 and accompanying text. However, as I discuss *infra* note 37, the government could obtain goods and information pursuant to a search incident to arrest even when it could not assert a superior possessory interest. In addition, the government in civil cases may well have been able to obtain information and property through subpoenas, which were subject only to diminished scrutiny under the Fourth Amendment. *See* Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 202-14 (1946) (concluding that the Fourth Amendment protects only against indefinite or overbroad subpoenas); *cf.* Hale v. Henkel, 201 U.S. 43, 76 (1906) (invalidating a subpoena for corporate records as "far too sweeping in its terms to be regarded as reasonable").

27. *See infra* note 37 and accompanying text.

28. *See* Cloud, *supra* note 8 (analyzing the property-based approach in greater depth). The Court's analysis, however, may not have been consistent with the Founders' original design. *See generally* Akhil R. Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 758 (1994) (calling the Court's Fourth Amendment jurisprudence "a vast jumble of judicial pronouncements that is not merely complex and contradictory, but often perverse").

United States,[29] for instance, the government had placed wiretaps on phone lines leading to the homes and basement offices of persons suspected of conspiring to violate the prohibition laws. In carrying out the investigation, law enforcement officers made no physical intrusion upon the suspects' property. Because "[t]here was no entry of the houses or offices of the defendants,"[30] the Court upheld the wiretapping. According to the Court, the Fourth Amendment protected only "material things."[31] The Court further explained that "[t]he language of the Amendment can not be extended and expanded to include telephone wires reaching to the whole world from the defendant's house or office. The intervening wires are not part of his house or office . . . ."[32] Investigative techniques fell within the purview of the Fourth Amendment if they infringed property rights.

The Court employed a similar analysis in determining whether the use of other listening devices constituted searches. As long as the listening device did not physically encroach upon the target's property, the Court found its utilization fully compatible with the Fourth Amendment. In *Goldman v. United States*,[33] for example, law enforcement authorities had placed a detectaphone outside the wall of a room in which the suspect was making calls. The Court ruled that, as long as authorities did not interfere with the suspect's property, they could monitor the phone calls.[34] In the absence of any encroachment on property rights, law enforcement officials could conduct investigations without the constraint of the Fourth Amendment's reasonableness requirement. Thus, in *Silverman v. United States*,[35] the Court invalidated a search only because the "spike mike" used by law enforcement authorities physically touched the suspects' premises.[36] To the Court, property rights lay at the heart of the interests protected under the Fourth Amendment.

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29. 277 U.S. 438 (1928).
30. *Id.* at 464.
31. *Id.*
32. *Id.* at 465.
33. 316 U.S. 129 (1942).
34. *Id.* at 134-35.
35. 365 U.S. 505 (1961).
36. *Id.* at 509. In addition, only those whose property interests had been violated could claim the protection of the exclusionary rule. Jeffers v. United States, 187 F.2d 498, 500 (D.C. Cir. 1950) (stating that the validity of an objection to evidence "turns upon [a] claim of ownership in the evidence seized"); *In re* Nassetta, 125 F.2d 924, 925 (2d Cir. 1942) ("[O]ne who has no proprietary or possessory interest in the premises searched or property seized may not suppress evidence obtained by a search and seizure violative of the rights of another."). Illegal wiretap evidence implicating an individual not party to the conversation could be used. *Cf.* Goldstein v. United States, 316 U.S. 114 (1942) (rejecting a challenge under the Federal Communications Act to the use of wiretap evidence against persons not party to the conversation). House guests could claim no protection from an illegal search because of their lack of property interest in the premises, even though they may have enjoyed a property interest in noncontraband goods seized during the search. *See* Jones v. United States, 362 U.S. 257, 265 (1960) (stating that "the prevailing view in the lower courts" had been to "den[y] standing to 'guests' and 'invitees'" to challenge seizures).

At the same time, the Court's property framework privileged property ownership from interference by law enforcement authorities, as long as the public could not claim a superior possessory interest in the property. The Court's cases stressed that law enforcement authorities' power to search was limited to instrumentalities[37] and fruits of the crime or contraband.[38] Mere evidence was beyond the scope of permissible search and seizure because individuals maintained an interest in personal property that, even if inculpatory, was not a product or instrumentality of the crime. For instance, in *Boyd v. United States*,[39] the Court invalidated a search—in part on Fourth Amendment grounds—because the suspect had a superior property interest in the item seized. The item at issue in *Boyd* was an invoice covering goods alleged to have been imported illegally. The Court explained:

> The search for and seizure of stolen or forfeited goods . . . are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him. . . . In the one case, the government is entitled to the possession of the property; in the other it is not.[40]

Thus, the individual's property right trumped the law enforcement authorities' power to search and seize.[41]

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37. In United States v. Kirschenblatt, 16 F.2d 202 (2d Cir. 1926), Judge Learned Hand explained that instruments of crime were subject to seizure in accordance with the historical rule that "the tool or other object which killed a man was deodand and forfeit; a burglar's kit or a counterfeiter's plate have never been property in the ordinary sense." *Id.* at 203; *see also* NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 133-34 (1937) (noting that at common law, warrants were "allowed only where the primary right to search and seizure [was] in the interest which the public or complainant had in the property seized"). Predictably, the Court gradually broadened the definition of an instrumentality of crime. *See* Marron v. United States, 275 U.S. 192, 199 (1927) (holding that instrumentalities of crime could include documents facilitating the illegal transaction—such as ledgers and bills—but not documents merely reflecting it).

38. The Court, however, recognized an exemption allowing for the seizure of evidentiary items uncovered during searches of a person incident to arrest. *See* Weeks v. United States, 232 U.S. 383, 392 (1914) (reiterating the common-law basis for the exemption); *see also* TELFORD TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 57 (1969) (suggesting that the exception arose because of vagaries of common-law practice). The Court never explained how or why this exception coexisted with the general ban on evidentiary searches.

39. 116 U.S. 616 (1886).

40. *Id.* at 623. The Court, at times, deviated from its ruling but never repudiated the doctrine of *Boyd*. *See, e.g.*, Adams v. New York, 192 U.S. 585 (1904) (upholding seizure of gambling slips and other personal papers).

41. The Court predicated its analysis on the English precedent of Entick v. Carrington, 19 How. St. Tr. 1030 (C.P. 1765), which similarly relied, in part, on a property analysis to invalidate a search. That case arose when the Secretary of State, the Earl of Halifax, sent messengers, armed with a general warrant, to seize the private papers of a publisher who had been critical of the government. In a subsequent civil trespass action by the publisher, the critical question was the validity of the search.

Similarly, in *Gouled v. United States*,[42] the Court stated that search warrants "may not be used as a means of gaining access to a man's house or office and papers solely for the purpose of making search to secure evidence to be used against him in a criminal or penal proceeding."[43] Respect for property rights underlay the decision: the right of law enforcement authorities to search existed only when "the public or complainant may have [an interest] in the property to be seized, or in the right to the possession of it, or when a valid exercise of the police power renders possession of the property by the accused unlawful and provides that it may be taken."[44] In other words, the government could only seize items for which it could claim a superior property interest, either because the item was contraband or because the item was forfeited due to its status as an instrumentality or fruit of a crime. The government could not claim any distinctive property interest in items solely of an evidentiary nature. During the *Lochner* era,[45] property—not surprisingly—served as the touchstone of Fourth Amendment jurisprudence: courts circumscribed governmental law enforcement efforts to preserve traditional property rights as much as possible.

B. The Current Privacy Basis of the Fourth Amendment

Continuing technological changes forced a reassessment of Fourth Amendment doctrine. With the increased sophistication of law enforcement techniques, the property construct appeared to slight both individual and governmental interests; in an era of electronic eavesdropping and forensic laboratory testing, property no longer seemed a satisfactory proxy for the individual rights at stake.[46] Governmental practices could be invasive without violating any property interest recognized at common law.

Lord Camden held the search invalid, reasoning that "[t]he great end, for which men entered into society, was to secure their property. That right is preserved sacred and incommunicable in all instances, where it has not been taken away or abridged by some public law for the good of the whole." *Id.* at 1066. Therefore, law enforcement authorities could seize only contraband and instrumentalities of crime. *See id.*

42. 255 U.S. 298 (1921).

43. *Id.* at 309.

44. *Id.*; *see* Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920) (forbidding the government from using illegally seized photocopies of a corporation's papers); *see also* United States v. Lefkowitz, 285 U.S. 452, 465-66 (1932) (following *Gouled* and prohibiting the use of an arrest warrant as the basis for a general search of premises for items of mere evidentiary value); Morrison v. United States, 262 F.2d 449 (D.C. Cir. 1958) (following *Gouled* and invalidating a warrantless search of an unoccupied private home).

45. *See* Amar, *supra* note 28, at 788 (maintaining that a common conception of property rights underlay *Boyd* and Lochner v. New York, 198 U.S. 45 (1905)); *see also* Cloud, *supra* note 8 (tracing the connections between *Lochner* and *Boyd*).

46. *Cf.* Silverman v. United States, 365 U.S. 505, 509 (1961) (taking note of the "frightening paraphernalia which the vaunted marvels of an electronic age may visit upon human society").

Moreover, in light of technological breakthroughs,[47] the government sought to rely more on evidence, though innocent in itself, that could nonetheless prove dispositive at trial.

The evolution in the Court's approach was gradual, but two decisions in 1967 pointedly marked a break from the past. In *Katz v. United States*,[48] the government indicted and subsequently convicted the defendant for interstate gambling. Law enforcement officers acquired the key evidence by attaching an electronic listening and recording device outside the public telephone booth from which the defendant placed interstate calls transmitting wagering information. In accordance with prior cases such as *Olmstead*, the court of appeals affirmed the conviction because the defendant's property rights were not invaded and, in any event, "[t]here was no physical entrance into the area occupied by [the defendant]."[49]

The Supreme Court, however, articulated a new vision of the Fourth Amendment. Arguing that the Amendment "protects people, not places,"[50] the Court declared that "[t]he premise that property interests control the right of the Government to search and seize has been discredited."[51] Given the expectation of privacy that individuals would attach to their conversations in phone booths, the Court concluded that attachment of the listening device constituted a search under the Fourth Amendment.[52] In dissent, Justice Black lamented the transformation, accusing the Court of "rewriting the Fourth Amendment"[53] and arguing that Fourth Amendment protections should be limited to "tangible things with size, form, and weight."[54]

Yet by decoupling property and the law of search and seizure, the Supreme Court also enhanced the power of law enforcement authorities. Law enforcement authorities are no longer cabined by the possibly superior possessory interest of targets. Rather, they can search for any items

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47. *Cf.* Robert C. Power, *Technology and the Fourth Amendment: A Proposed Formulation for Visual Searches*, 80 J. CRIM. L. & CRIMINOLOGY 1 n.1 (1989) (noting "an astonishing increase in the variety and sophistication of visual surveillance devices" and describing DNA testing as "[o]ne of the most important recent developments" in the use of technology in criminal cases).

48. 389 U.S. 347 (1967).

49. Katz v. United States, 369 F.2d 130, 134 (9th Cir. 1966).

50. *Katz*, 389 U.S. at 351.

51. *Id.* at 353 (alteration in original) (quoting Warden v. Hayden, 387 U.S. 294, 304 (1967)).

52. *Id.* at 359.

53. *Id.* at 373 (Black, J., dissenting).

54. *Id.* at 365 (Black, J., dissenting). Several years prior to *Katz*, the Court also permitted targets to challenge searches and seizures even when they infringed only on the property rights of third parties. For instance, the Court authorized defendants to raise Fourth Amendment challenges after warrantless searches in friends' apartments, Jones v. United States, 362 U.S. 257, 267 (1960), and in taxicabs, Rios v. United States, 364 U.S. 253, 262 (1960). *See supra* note 36 (addressing earlier cases).

relevant to a law enforcement investigation—even those for which a target can claim an unquestionably legitimate property interest—as long as they are respectful of reasonable expectations of privacy in seizing the items. With a proper warrant, law enforcement authorities can now search for all evidence linking a suspect to a crime, even the personal property of the target or a third party.

In the other significant decision of 1967, *Warden v. Hayden*,[55] the Court abandoned the "mere evidence" restriction on police authorities.[56] In *Hayden*, police tracked the suspected perpetrator of a bank robbery into a house, gained admission from the apparent owner, and found the suspect feigning sleep in an upstairs bedroom. In a bathroom located nearby, the police discovered a shotgun and pistol. The Court upheld the seizure of the firearms as contraband.[57] Police also discovered—in a washing machine—clothes fitting the description of those worn by the bank robber. The defendant sought to have the clothes suppressed on the ground that, under *Gouled*, law enforcement authorities could seize only instrumentalities of crime, fruits of crime, or contraband and not mere evidence of crime such as the clothes at issue.[58] The government, in other words, enjoyed no property interest in the clothes seized.

The Court repudiated the property underpinnings of the mere evidence rule. The Court reasoned that "[t]he requirement that the Government assert in addition some property interest in material it seizes has long been a fiction, obscuring the reality that government has an interest in solving crime."[59] The Court further explained that, in light of its changing focus from property rights to privacy interests, "[t]he requirements of the Fourth Amendment can secure the same protection of privacy whether the search is for 'mere evidence' or for fruits, instrumentalities or contraband."[60] An unlawfully obtained item can be suppressed, whether it is contraband or of evidentiary value only. If the objects obtained are merely of evidentiary value, then the state may have to return the objects after their evidentiary use is completed—"the introduction of 'mere evidence' does not in itself entitle the State to its retention."[61] The Court, therefore, concluded that "[p]rivacy is disturbed no more by a search directed to a purely evidentiary object than it is by a search directed to an instrumentality, fruit, or contraband."[62] If the individual's property is germane

55. 387 U.S. 294 (1967).
56. *Id.* at 310.
57. *Id.*
58. *Id.* at 302.
59. *Id.* at 306 (footnote omitted).
60. *Id.* at 306-07.
61. *Id.* at 307-08.
62. *Id.* at 301-02.

to the crime under investigation, the state can now seize that property irrespective of the individual's superior possessory interest, as long as the state does not violate any reasonable expectation of privacy.[63]

Thus, the Warren Court's abandonment of the property construct has raised the question of the Fourth Amendment's temporal relevance for the first time. When the Court used property concepts to resolve search and seizure disputes between the government and individuals, the government's subsequent use of properly seized information and goods was not problematic. The government's possessory interest justifying the initial seizure overrode any objection to subsequent uses. But because the government no longer needs a superior possessory interest to justify seizure of information and goods, does the Fourth Amendment constrain governmental authorities' use of items and information after the seizure? It is a question the Supreme Court has never directly confronted.

II. The Temporal Component of Reasonable Searches and Seizures

So far I have argued that the movement in Fourth Amendment jurisprudence from property to privacy had two chief consequences: first, it increased the number of situations in which individuals enjoyed protection under the Fourth Amendment; and second, it restricted the property rights of individuals by allowing law enforcement authorities to obtain a larger amount of information and items, albeit in fewer cases. In this Part, I turn to an unexamined connection between these two developments. Because the original seizure no longer extinguishes all property or privacy rights of the individual, governmental authorities violate the Fourth Amendment if they use property or information unreasonably even when lawfully obtained. Particularly in light of new technology, privacy is threatened as much by what law enforcement authorities do with information as by the original acquisition itself.

A. The Scope of Reasonable Expectations of Privacy

The Supreme Court, in cases such as *Katz*, has focused on individuals' reasonable expectations of privacy in the place to be searched and things

63. For an argument that a property-based system would be more protective of individual liberty, see Cloud, *supra* note 8. *See also* Heather L. Hanson, Note, *The Fourth Amendment in the Workplace: Are We Really Being Reasonable?*, 79 VA. L. REV. 243 (1993) (arguing that a property-based system would at least be more protective of government employees). Evaluation of the transformation from a property- to a privacy-based system is beyond the scope of this Article. I do, however, accept the underlying premise that confining the Fourth Amendment to property notions undervalues both the individual and governmental interests at stake. The Fourth Amendment ideally should respect both property and privacy rights, yet should not confine the government's seizure authority to contexts in which the government can assert a superior possessory interest.

to be seized.[64] Although courts may still find property concepts relevant, they have never confined the reasonableness inquiry to the geographical boundaries in which a search takes place. Rather, it is the overall intrusion by governmental authorities that must be measured, not just the incursion into a person's "space." After *Katz*, for instance, courts have protected the expectation of privacy in phone conversations and other modes of communication, even when the communication does not occur in a private place.[65] Similarly, the Court has held that analysis of urine samples also constitutes a search, even when the sample is already in the possession of governmental authorities.[66] The government's physical custody of urine or blood samples does not terminate the individual's interest in keeping their contents private. In addition, the right of law enforcement authorities to seize a videotape does not necessarily extend to viewing or disseminating the video's contents because of the additional privacy rights potentially implicated.[67]

The manner of a search may also be unreasonable. Even prior to *Katz*, the Supreme Court, in *Kremen v. United States*,[68] objected to the FBI's behavior in conducting a search. After tracking a fugitive to a deserted cabin and carrying out surveillance, FBI agents arrested the fugitive and those harboring him, and then made a warrantless search of the cabin. The agents carted almost all the contents of the cabin some two hundred miles away to San Francisco. The Court held that, even though there was nothing illegitimate about a search incident to arrest, the FBI's removal of all the items in the cabin and its subsequent decision to inventory those items a great distance away violated the suspect's

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64. Some commentators argue that reasonableness should be the sole touchstone of Fourth Amendment analysis and that the current focus on warrants and probable cause is misguided from both historical and policy perspectives. *E.g.*, Amar, *supra* note 28, at 800-11.

65. *See, e.g.*, United States v. McIntyre, 582 F.2d 1221, 1224 (9th Cir. 1978) (recognizing a privacy interest in conversations in an office with open doors within a police station); United States v. Costanza, 549 F.2d 1126, 1134 (8th Cir. 1977) (recognizing an expectation of privacy in conversations in a public store); State v. Bunnell, 856 P.2d 1265, 1276-77 (Haw. 1993) (recognizing a reasonable expectation of privacy for postal employees in a breakroom at a post office).

66. *See* Vernonia Sch. Dist. 47J v. Acton, 115 S. Ct. 2386, 2393 (1995) ("The other privacy invasive aspect of urinalysis is, of course, the information it discloses concerning the state of the student's body . . . ."); Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 616-17 (1989) ("The ensuing chemical analysis of the sample to obtain physiological data is a further invasion of the tested employee's privacy interests. . . . It is not disputed . . . that chemical analysis of urine, like that of blood, can reveal a host of private medical facts about an employee, including whether he or she is epileptic, pregnant, or diabetic.").

67. *See, e.g.*, Ross v. State, 475 A.2d 481, 486-87 (Md. Ct. Spec. App.) (holding that, although the police had the right to seize a videotape, a further search occurred when the officers viewed the videotape), *cert. denied*, 482 A.2d 502 (Md. 1984). Similarly, the seizure of a briefcase by governmental authorities pursuant to an inventory search of an automobile does not necessarily entitle the authorities to scrutinize the contents of the briefcase. Florida v. Wells, 495 U.S. 1, 4 (1990).

68. 353 U.S. 346 (1957).

reasonable expectation of privacy.[69] Similarly, guards who conduct close searches of prisoners of the opposite gender may infringe reasonable expectations of privacy, even though the searches would not otherwise run afoul of the Fourth Amendment.[70]

Moreover, reasonable expectations are not static. The expectations of a society in which large families often lived together in a two-room house are not the same as those of a society now accustomed to more spacious living arrangements.[71] The expectations of a society in which party-line telephones were customary differ from those in which private lines predominate. And the expectations of society change in the face of new technologies, such as DNA blood testing or weapons detection.[72] Indeed, Supreme Court Justices have adverted to the evolving nature of the reasonable expectations of privacy protected under the Fourth Amendment.[73] The reasonableness inquiry, therefore, is not confined to

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69. *Id.* at 347. Furthermore, in Von Cleef v. New Jersey, 395 U.S. 814 (1969), Justice Harlan noted that "*Kremen* simply prohibits the police from seizing the entire contents of a building indiscriminately . . . ." *Id.* at 817 (Harlan, J., concurring). The manner of search was unrelated to any legitimate purpose in securing evidence at the cabin. *Cf. Kremen*, 353 U.S. at 347 ("The seizure of the entire contents of the house and its removal . . . are beyond the sanction of any of our cases.").

70. *See, e.g.*, Cornwell v. Dahlberg, 963 F.2d 912, 916-17 (6th Cir. 1992); Bonitz v. Fair, 804 F.2d 164, 173 (1st Cir. 1986) (both recognizing that a strip search conducted by or in the presence of officers of the opposite gender raised a Fourth Amendment claim).

71. *See generally* Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, 332 (1983) ("Our mobile and industrial society offers opportunities for anonymity unimagined by inhabitants of the small, cohesive towns and villages of rural England and early America.").

72. The changes in airport security provide a case in point. *See, e.g.*, United States v. Pulido-Baqueirizo, 800 F.2d 899, 901 (9th Cir. 1986); United States v. Epperson, 454 F.2d 769, 770 (4th Cir.), *cert. denied*, 406 U.S. 947 (1972) (both holding that a limited search at the airport for weapons is reasonable). For a more general discussion of contemporary attitudes toward privacy, see Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at "Understandings Recognized and Permitted by Society,"* 42 DUKE L.J. 727 (1993).

73. *See, e.g.*, Florida v. Riley, 488 U.S. 445, 452 (1989) (O'Connor, J., concurring); *id.* at 456 (Brennan, J., dissenting); *id.* at 467 (Blackmun, J., dissenting) (all noting that reasonable expectations of privacy from aerial overflights change with time). Justice Scalia's position has been more ambivalent. *Compare* California v. Acevedo, 500 U.S. 565, 583 (1991) (Scalia, J., concurring) ("[C]hanges in the surrounding legal rules . . . may make a warrant indispensable to reasonableness where it once was not.") *with* Minnesota v. Dickerson, 113 S. Ct. 2130, 2139 (1993) (Scalia, J., concurring) ("The purpose of the [Fourth Amendment] . . . is to preserve that degree of respect for the privacy of persons and the inviolability of their property that existed when [it] was adopted—even if a later, less virtuous age should become accustomed to considering all sorts of intrusion 'reasonable.'"). Justice Scalia's equivocation mirrors that of the Court in Carroll v. United States, 267 U.S. 132 (1925), in which the Court stated that the Fourth Amendment "is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens." *Id.* at 149. The difficulty is that what may have conserved "the interests and rights of individual citizens" during the Founding Era will not necessarily conserve those interests today in an era of computers and cellular phones.

the place searched or items seized, but focuses rather on the overarching relationship between government and individual.

B. Reasonableness as a Limit on the Use of Information and Evidence Obtained through Searches and Seizures

The government's need for information is unquestioned, and few interests are as compelling as prosecuting and preventing crime. Nonetheless, when the government seeks information or evidence to further a criminal investigation, its needs must be accommodated with the privacy rights at stake. Similarly, other governmental acquisition efforts—whether to monitor regulatory directives or supervise employees' efficiency—must respect privacy interests. A search or seizure is justified to the extent that the government's purpose overrides the individual's interest; in general, the greater the state interest and the lesser the impact on the individual's property and privacy rights, the more likely it is that courts will uphold the action.[74]

The government's intended use of the items or information sought factors into the balance in two distinct ways. First, the individual interest at stake varies with the state's use of the materials seized. Examining a suspect's blood for evidence of intoxication raises different issues than examining the blood for evidence of genetic defects.[75] Disclosure of the

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74. Although the Supreme Court has never adopted any categorical accommodation, it has held that searches of private residences for evidence in conjunction with law enforcement investigations—one of the most critical government functions—are presumptively unconstitutional without a warrant. *See* United States v. United States Dist. Court, 407 U.S. 297, 313 (1972) ("[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed."). Given the substantial privacy interests implicated, law enforcement agents can undertake searches of private residences only if they are relatively certain of finding evidence linked to the investigation of a crime. On the other hand, the Court has held that only individualized suspicion (and no warrant) is required if a less intrusive law enforcement search is contemplated. *See Dickerson*, 113 S. Ct. at 2136 (finding that no warrant is needed for a pat-down if "reasonable suspicion based on specific and articulable facts" exists); Terry v. Ohio, 392 U.S. 1, 27 (1968) (holding that no warrant is needed for a brief stop and frisk and that individualized suspicion is sufficient). Government officials generally have less weighty interests in conducting searches to determine compliance with regulatory directives, but the Court has upheld warrantless searches of businesses when the administrative scheme, through its bureaucratic requirements, substitutes for the protections of a warrant. *See infra* note 195. If the government's purpose in pursuing a search is not sufficiently weighty, however, the Court will forbid the intrusion altogether, regardless of any safeguards. The linchpin in all contexts remains the reasonableness of the search in light of the reasons set forth by the state and the privacy interests affected.

75. Disclosure of genetic defects such as Huntington's disease might not only change a person's way of life, but might also have more mundane consequences, such as loss of insurance coverage or employment. Indeed, African Americans with a sickle cell trait faced discrimination in employment during the 1970s merely because they had a genetic defect. LORI B. ANDREWS, MEDICAL GENETICS: A LEGAL FRONTIER 18 (1987); *see* Larry Gostin, *Genetic Discrimination: The Use of Genetically Based Diagnostic and Prognostic Tests by Employers and Insurers*, 17 AM. J.L. & MED. 109, 138-39 (1991) (discussing a 1977 case in which an employer fired a worker with sickle cell anemia because of concerns about the worker's health).

contents of a briefcase to a governmental official may well implicate different privacy concerns than disclosure to fellow workers, neighbors, or even strangers. The nature of the individual's interest can only be ascertained by considering the government's planned utilization of the property or information.

Second, the state's intended use also affects the magnitude of the state's interest. A search of an individual's house by governmental authorities may be reasonable for one particular purpose, such as when authorities are pursuing a suspect. But that same search may be unreasonable if it is undertaken for a different purpose, such as viewing the individual's private art collection or determining whether that individual's tax records are in order.[76] When courts hold that a particular search is reasonable, they are sanctioning the government's seizure of the evidence for the articulated purpose. Courts are not thereby authorizing law enforcement agents to search and seize for any other purpose. Thus, the constitutionality of searches and seizures hinges, in part, on the intended use of the materials sought: reasonableness cannot be assessed apart from consideration of the government's use of the items seized.

1. Duty to Return Property Seized—Rule 41(e).—Prior to *Hayden*, individuals could petition a court for return of property unlawfully seized by law enforcement authorities. The petition could be made prior or subsequent to trial. A motion prior to trial served as a motion to exclude the items from evidence under the exclusionary rule. Although authorities would never return contraband, individuals could recover personal effects if they were unconstitutionally seized.[77]

The Supreme Court codified that practice in Rule 41(e) of the Federal Rules of Criminal Procedure:

> A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the

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76. *See, e.g.*, GM Leasing Corp. v. United States, 429 U.S. 338, 359 (1977) (invalidating warrantless searches of business premises to enforce tax laws); LeClair v. Hart, 800 F.2d 692 (7th Cir. 1986) (ordering trial on a damages action arising out of IRS agents' seizure of information during a search of a home); Abram v. Handley, 94-2 U.S. Tax Cas. (CCH) ¶ 50,514 (D. Kan. May 9, 1994) (denying a summary judgment motion filed by IRS agents who allegedly conducted an invalid search); *see also* Roaden v. Kentucky, 413 U.S. 496, 501 (1973) ("A seizure reasonable as to one type of material in one setting may be unreasonable in a different setting or with respect to another kind of material."). Even if one purpose for the search and seizure is legitimate, the presence of an additional illegitimate purpose conceivably tilts the balance toward the individual privacy rights at stake.

77. Osmond K. Fraenkel, *Concerning Searches and Seizures*, 34 HARV. L. REV. 361, 384-85 (1921); *see also* 2 WILLIAM E. RINGEL, SEARCHES AND SEIZURES, ARRESTS AND CONFESSIONS § 20.9 (Justin D. Franklin et al. eds., 2d ed. 1995) (setting forth the law on motions for the return of seized property). If the individual were convicted, however, authorities might not even return property that was not contraband. *See* HUBERT E. DAX & BROOKE TIBBS, ARREST, SEARCH AND SEIZURE 146 (1946) ("If offender is acquitted, it *may* be proper for law-enforcing authorities to . . . make proper return of such 'non-contraband.'" (emphasis added)).

> return of the property . . . . If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial.[78]

The Rule made federal practice uniform among jurisdictions and limited the authority of commissioners in some jurisdictions to consider the motions.[79] The Rule respected the property rights of individuals unless law enforcement officials could override those rights by showing a superior property interest—namely, that the goods were contraband or instrumentalities of crime.[80] In other words, it made no provision for the return of lawfully seized property, even when no further law enforcement purposes were contemplated. Prior to *Hayden*, that balance made sense because the government generally could seize items only if they were instrumentalities of crime or contraband.[81] As long as the items were seized legally, the individual could not assert a superior property interest.[82]

After *Hayden* and *Katz*, however, the touchstone of Fourth Amendment analysis was no longer the superiority of respective property interests. Prevailing practice regarding the return of lawfully seized property correspondingly changed. Rule 41(e) currently entitles any individual to the return of property, regardless of the seizure's legality: "A person aggrieved by an unlawful search and seizure *or by the deprivation of property* may move . . . for the return of the property. . . ."[83] Thus, even one who is lawfully subjected to a seizure can petition for the return of property that is no longer needed by law enforcement authorities, before or after trial. The Advisory Committee notes explain that "[b]efore the amendment, Rule 41(e) . . . failed to address the harm that may result from the interference with the lawful use of property by persons who are not suspected of wrongdoing. Courts have recognized that once the government no longer has a need to use evidence, it should be

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78. Fed. R. Crim. P. 41(e), 327 U.S. 864-65 (1945).

79. *See Notes to the Rules of Criminal Procedure for the District Courts of the United States*, 4 F.R.D. 405, 428 (1945) ("While under existing law a motion . . . to compel return of property obtained by an illegal search and seizure may be made either before a commissioner . . . or before the court, the rule provides that such motion may be made only before the court.").

80. Subsequently, the Rule was amended to clarify that a motion for return of property after an indictment has been filed should be treated as a motion to suppress under Rule 12 of the Federal Rules of Criminal Procedure and that it could be submitted to the trial court as opposed to the court in whose district the property was seized. *Amendments to Federal Rules of Criminal Procedure*, 56 F.R.D. 143, 167 (1972). However, an individual seeking return of property is still permitted to submit a motion to the court in whose district the property was seized. FED. R. CRIM. P. 41(e).

81. For the narrow exceptions, see *supra* note 26.

82. I assume that some personal effects seized incident to arrest were probably returned at the discretion of prosecutors or courts.

83. FED. R. CRIM. P. 41(e) (emphasis added).

returned."[84] The notes continue that "a person whose property has been lawfully seized may seek return of property when aggrieved by the government's continued possession of it"[85] and conclude that "reasonableness . . . must be the test."[86] The Rule is not limited to those exonerated or uninvolved in the criminal investigation.

A case relied on by the Advisory Committee, *United States v. Wilson*,[87] illustrates the reasoning underlying the change. In *Wilson*, police executing a search warrant to investigate a suspected cocaine dealer seized $2725 in cash. The defendant subsequently entered into a plea bargain in which he pleaded guilty to a charge of illegal possession of marijuana. At that time, he moved for return of the seized money. The prosecutor acquiesced only to the extent of $175, contending that—based on an examination of the defendant's bank account—the rest of the money was likely attributable to illegal activity. The trial judge never ruled on the motion, and the prosecutor deposited the remaining funds into the General Revenue Fund of the District of Columbia. The defendant subsequently renewed his motion for a return of the property, and the district court summarily denied the motion. The defendant appealed, relying both on Rule 41(e) and on the Due Process Clause.[88]

The court of appeals reversed, holding that, despite the language in the extant version of the Rule, the district court "has both the jurisdiction and the duty to ensure the return of such property."[89] Quoting from the ALI Model Code, the court noted:

> If the seizure is for evidentiary purposes of things innocent in themselves, as for example an identifying garment or incriminating records, the lawfulness of the seizure goes only to the question of when they should be returned; when their evidentiary utility is exhausted, the owner should have back his overcoat or his business ledger.[90]

The lawfulness of the search was not dispositive, for the individual plainly had a greater entitlement to the money than did the District of Columbia, after the money's relevance to the criminal proceedings had ended.[91]

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84. *Amendments to the Federal Rules of Criminal Procedure* advisory committee's note, 124 F.R.D. 397, 427 (1989) [hereinafter *1989 Amendments* advisory committee's note].

85. *Id.*

86. *Id.* at 428.

87. 540 F.2d 1100 (D.C. Cir. 1976); *see 1989 Amendments* advisory committee's note, *supra* note 84, at 427.

88. *Wilson*, 540 F.2d at 1102.

89. *Id.* at 1101.

90. *Id.* at 1103 n.4 (quoting MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 280.3 note (1975)); *see also* Mr. Lucky Messenger Serv., Inc. v. United States, 587 F.2d 15 (7th Cir. 1978) (requiring the return of $65,000 seized from the claimant).

91. Indeed, continuing retention of the money may, in addition, have violated the Takings Clause. That clause might force government authorities to pay compensation in some contexts. After *Hayden*,

Although Rule 41(e) is not explicitly predicated on the demands of the Fourth Amendment, its suggestion that a reasonable seizure may become unreasonable with the passage of time is rooted in Fourth Amendment concerns. The Fourth Amendment can best be understood as privileging the government's use of the items seized for the purpose justifying the search. Some secondary uses, even if not justifying the initial seizure, are nonetheless reasonable. For instance, if a car is seized to examine blood stains, the government might act reasonably if, before returning the car, it briefly used the car in a demonstration to train officers where to search for telltale stains. But not all secondary uses are reasonable in light of the individual's property interests. For instance, the government's wish to utilize a seized car for crash tests cannot justify continued retention of the property. Rule 41(e) reflects the consequences of the shift to a privacy-based Fourth Amendment: the government no longer can be thought to acquire title to all goods it seizes. The government's power to seize does not extinguish an individual's interest in the seized property. As a result, a continuing constraint of reasonableness should remain.

Contrast the government's duty to return property seized pursuant to the Fourth Amendment with its unilateral authority to use property obtained through its power of eminent domain. Governments can only exercise that power if they plan to use the targeted property for a public purpose.[92] But once the acquisition is complete, then the government acquires title to the property and can dispose of the land as it deems proper. For instance, years after the federal government established Camp Breckenridge in Kentucky upon property acquired through eminent domain, it subsequently decided to close the base and sell the mineral rights to the land. The original owners of the tracts sought to rescind the government's prior exercise of eminent domain. In *Higginson v. United States*,[93] the Sixth Circuit dismissed the case, explaining that "[t]he subsequent abandonment of Camp Breckenridge did not affect the validity of the government's title to the land acquired by condemnation. . . . [Rather], [t]he validity of title is determined by the conditions existing at the time of the taking."[94]

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if the government seizes property for the public end of law enforcement, there is no apparent reason why it should not pay just compensation, as long as the original owners enjoy a continuing property interest in the thing seized. Most governmental seizures of "innocent" items, however, do not violate the Takings Clause as long as the items are returned relatively quickly. One can imagine that a seizure of a house might nonetheless trigger the compensation requirement. *Cf.* Amar, *supra* note 28, at 807-08 (raising the possibility that a long-term grand jury subpoena could require compensation).

92. The Supreme Court has interpreted "public purpose" broadly. *See, e.g.*, Hawaii Housing Auth. v. Midkiff, 467 U.S. 229, 245 (1984) (holding that Hawaii's plan to use eminent domain to transfer title from large landowners to their lessees met the "public purpose" requirement of the Fifth Amendment); Berman v. Parker, 348 U.S. 26, 33 (1954) (approving the use of eminent domain for urban redevelopment).

93. 384 F.2d 504 (6th Cir. 1967), *cert. denied*, 390 U.S. 947 (1968).

94. *Id.* at 507; *see also* Beistline v. City of San Diego, 256 F.2d 421, 424 (9th Cir.) (approving the sale of land originally acquired for a municipal airport), *cert. denied*, 358 U.S. 865 (1958); United

But seizures pursuant to the Fourth Amendment are different. Title does not pass to the government. Rather, the government has sufficient interest to obtain the property only for a particular purpose,[95] and the owner's rights are not thereby extinguished. Rule 41(e) reflects a sound elaboration of Fourth Amendment requirements, and violations of the Rule[96] should therefore be subject to challenge under the Fourth Amendment.[97]

2. Duty to Return Information Seized.—Use restrictions similarly should apply to information obtained through governmental searches and seizures. In some contexts, individuals enjoy a property interest in the information seized.[98] But even when no traditional property interest is implicated, the loss of dominion over private information can be just as devastating to an individual as the deprivation of the more tangible

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States v. Three Parcels of Land, 224 F. Supp. 873, 875 (D. Alaska 1963) (holding that the government need not use land obtained through eminent domain to support postal facilities, even though the land was acquired for that purpose).

95. Instead of using the eminent domain analogy, a seizure under the Fourth Amendment may resemble more closely a bequest for a particular purpose with a reversionary interest: ownership is allowed only so long as the property is used for the purpose specified by the grantor.

96. States have also adopted procedures to ensure the return of property after its evidentiary use is completed. *See, e.g.*, Pattmon v. State, 512 So. 2d 951 (Fla. Ct. App. 1987); State v. Lamb, 645 So. 2d 791 (La. Ct. App. 1994); State v. Card, 741 P.2d 65 (Wash. Ct. App. 1987) (all addressing procedural requirements for the return of property). The Fourth Amendment imperative of a reasonable use should be the same at the federal and state levels.

97. The need today to recognize the constitutional underpinnings of Rule 41(e) should not be underestimated. Various law enforcement agencies have not always been diligent in returning property legitimately seized. *Cf.* Christopher Cooper, *Cops Still Haven't Returned Cars*, TIMES PICAYUNE (New Orleans), Nov. 10, 1993, at A1 (reporting that police often appropriate stolen vehicles for department use without searching for a true owner); Gary Webb, *What Two Sacramentans Learned About Asset Seizure*, SACRAMENTO BEE, Sept. 26, 1993, at FO2 (detailing how police unconscionably delayed returning money seized and, in one case, refused to return an entire amount).

98. Courts have also found particular aspects of private information to be protected under copyright law. *See, e.g.*, Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539 (1985) (protecting President Gerald Ford's reminiscences contained in an unpublished manuscript); New Era Publications Int'l v. Henry Holt & Co., 873 F.2d 576 (2d Cir. 1989) (protecting private expression written in diaries), *cert. denied*, 493 U.S. 1094 (1990); Salinger v. Random House, Inc., 811 F.2d 90 (2d Cir.) (protecting personal letters under copyright law), *cert. denied*, 484 U.S. 890 (1987); *see also* Alan L. Zegas, Note, *Personal Letters: A Dilemma for Copyright and Privacy Law*, 33 RUTGERS L. REV. 134, 136-44 (1980) (addressing common-law protection for information conveyed in personal letters); Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 205-11 (1890) (predicating the right of privacy, in part, on common-law protections afforded to personal letters). Moreover, genetic information may soon be protected by property law. *See generally* Catherine M. Valerio Barrad, Comment, *Genetic Information and Property Theory*, 87 NW. U. L. REV. 1037 (1993) (arguing that genetic information should be protected more fully by property law); *cf.* Moore v. Regents of the Univ. of Cal., 793 P.2d 479, 485, 490-93 (Cal. 1990) (declining to find a property right in genetic material that is sufficient to support a conversion claim, but recognizing a cause of action for lack of informed consent when such material is used without disclosure to the patient), *cert. denied*, 499 U.S. 936 (1991).

overcoat or cash.[99] Law enforcement authorities should have the right to use seized items only for purposes consistent with the reasonableness requirement of the Fourth Amendment. Once such purposes no longer exist, justification for continued possession of the property and information ceases.

Some governmental uses of information would not materially intrude upon an individual's privacy. As long as the government officials have the authority to enter into a suspect's house, for example, the suspect may suffer no additional harm to any cognizable property or privacy interest if the officers stop to study the interior layout of a living room in order later to rearrange their own furniture. Similarly, once authorities have legitimately seized invoices from a closely regulated company to determine compliance with administrative regulations, the officials of that company lose no additional privacy if the regulators use those invoices, with names blotted out, in constructing a training film on how to execute a proper search.

But other types of subsequent governmental use of information may intrude upon privacy far more than the initial seizure itself, just as the chemical analysis of blood and urine samples may constitute a greater intrusion into privacy than the collection of the sample.[100] For instance, Senator Packwood may well have suffered more from publication of his diaries in the press than he had from disclosing them to Senate investigators.[101] Businesses may have more to fear from disclosure of records to competitors than from required disclosure to government officials monitoring compliance with environmental regulations.[102] Many of us would unquestionably suffer if information concerning our health, rentals of movie videos,[103] or prior scrapes with law enforcement personnel[104]

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99. Indeed, courts long ago recognized this connection in the context of the exclusionary rule. Courts not only required the return of property illegally seized but also the suppression of any information gleaned from that property. *See* Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) (declaring that evidence acquired in violation of the Fourth Amendment "shall not be used at all"); Flagg v. United States, 233 F. 481, 484 (2d Cir. 1916) (reasoning that failing to suppress illegally obtained evidence gives "judicial sanction to a wholly illegal proceeding and make[s] . . . a search warrant unnecessary").

100. *See supra* note 66 and accompanying text; *see also* State v. Russell, 848 P.2d 657, 660 (Or. Ct. App.) (Warren, J., dissenting) ("[A]n invasion of privacy is not necessarily a discrete event. A person's privacy can be invaded when another person discovers private information and again when that person discloses the private information to others."), *review denied*, 858 P.2d 1314 (Or. 1993).

101. *See supra* notes 10-11 and accompanying text.

102. *Cf.* Western States Cattle Co. v. Edwards, 895 F.2d 438 (8th Cir. 1990) (recognizing that a firm disclosing information to a government agency could be harmed by subsequent disclosure of that information to the firm's customers); *see infra* text accompanying notes 116-20.

103. *See* Video Privacy Protection Act of 1988, 18 U.S.C. § 2710 (1994) (establishing a cause of action for an individual against a video retailer who discloses personal information in his video rental or purchase records).

104. For a discussion, see OFFICE OF TECHNOLOGY ASSESSMENT, FEDERAL GOVERNMENT INFORMATION TECHNOLOGY: ELECTRONIC RECORD SYSTEMS AND INDIVIDUAL PRIVACY 29-34 (1986).

were widely available to the public at large.[105] Increased reliance on computerization and data banks augments the potential for injury.

Admittedly, law enforcement authorities cannot return information as easily as property. Neither the impressions retained by officials conducting a search nor the memories of juries can be erased. If information relevant to a crime finds its way into the press, anyone interested can retrieve it in the future.

Yet even if the information cannot be returned, it can be controlled to limit the impact on privacy. Despite the difficulties involved with cordoning off information—as opposed to physical property—legislatures have long required government officials to restrict access to information in their records affecting personal privacy. The Privacy Act[106] is a case in point. In pertinent part, the statute provides:

> No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be . . . required under [the Freedom of Information Act].[107]

Although the Freedom of Information Act (FOIA) recognizes the public's interest in obtaining information in government files, the FOIA exempts

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See also United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 756, 780 (1989) (holding that the FBI was not required to disclose rap sheets of individuals under the Freedom of Information Act because the Act allows for nondisclosure of law enforcement materials that "could reasonably be expected to constitute an unwarranted invasion of personal privacy" (quoting 5 U.S.C. § 552(b)(7)(C) (1994))).

105. Indeed, the Advisory Committee recommending the recent amendment to Rule 41(e) relied not only on United States v. Wilson, 540 F.2d 1100, 1103 (D.C. Cir. 1976), which involved the return of property, but also on Paton v. La Prade, 524 F.2d 862 (3d Cir. 1975), a case addressing the government's seizure of information. *1989 Amendments* advisory committee's note, *supra* note 84, at 427, 429. In *Paton*, a high school student alleged that the FBI obtained her name and address by virtue of surveillance of all mail delivered to the Socialist Workers Party (SWP), to whom she had written as part of a social studies course. The FBI allegedly instructed the post office to record all names appearing on correspondence to the SWP, but not to open the mail itself. An FBI official subsequently investigated the student, interviewed a number of her acquaintances, and cleared her of any direct involvement in SWP activities. The student sued for violation of her constitutional rights, in part requesting expungement of her FBI file. The court of appeals remanded the issue back to the district court, instructing it to balance "the harm caused to an individual by the existence of any records . . . against the utility to the Government of their maintenance." *Paton*, 524 F.2d at 868. Although the court did not predicate its analysis on Fourth Amendment grounds—perhaps because no "search" was involved—it suggested that retention of the information might not be reasonable even if the investigation had been legitimate. Just as in *Wilson*, the reasonableness of an initial search or seizure does not necessarily ensure that the government can keep the information or property forever. Reasonable expectations of privacy should extend to the use that law enforcement agents make of information lawfully obtained.

106. 5 U.S.C. § 552a (1994).

107. *Id.* § 552a(b)(2).

disclosure of files if that disclosure would constitute an unwarranted invasion of privacy.[108]

Indeed, the Privacy Act and FOIA may even bar disclosure of previously publicized information.[109] Consider, for instance, the Supreme Court's recent decision in *United States Department of Defense v. Federal Labor Relations Authority*.[110] There, public employee unions sought the home addresses of agency employees represented by unions. The FLRA had ordered disclosure, and the Fifth Circuit enforced the order on review.[111] In reversing, the Supreme Court adverted to the "not insubstantial" privacy interests at stake, reasoning that although "[i]t is true that home addresses often are publicly available through sources such as telephone directories and voter registration lists, ... [a]n individual's interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some form."[112] The Supreme Court recognized that

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108. One exemption in the FOIA blocks disclosure of "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy," and another exemption precludes the release of information compiled for law enforcement purposes that "could reasonably be expected to constitute an unwarranted invasion of personal privacy." *Id.* § 552(b)(6), (b)(7)(C).

109. Other statutes protect privacy as well. For instance, Congress enacted the Video Privacy Protection Act of 1988, Pub. L. No. 100-618, 102 Stat. 3195 (codified at 18 U.S.C. § 2710 (1994)), in response to disclosure that several groups opposing Judge Bork's nomination to the Supreme Court had unearthed a list of movies he had rented in prior years. Michele Galen & Jeffrey Rothfeder, *The Right to Privacy: There's More Loophole Than Law*, BUS. WK., Sept. 4, 1989, *available in* LEXIS, News Library, BUSWK File. To control and limit interception of various forms of electronic surveillance, including electronic mail and pen registers, Congress passed the Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848 (codified at scattered sections of 18 U.S.C.), and to protect against abuse by cable companies monitoring viewer selection, it passed the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 631, 98 Stat. 2779, 2794-95 (codified as amended at 47 U.S.C. § 551 (1988 & Supp. V 1993)). To avoid mistakes arising in transferring data, Congress enacted the Computer Matching and Privacy Protection Act of 1988, Pub. L. No. 100-503, 102 Stat. 2507 (codified as amended at 5 U.S.C. § 552a (1994)). For criticisms of widespread computer matching in government, see Shattuck, *supra* note 18, at 1001-03 and OFFICE OF TECHNOLOGY ASSESSMENT, *supra* note 104, at 37-63. Additional statutes limit what the government can do with information generated under its directives. *See, e.g.*, Tax Reform Act of 1976, 26 U.S.C. § 6103 (1988 & Supp. V 1993) (establishing the general confidentiality of tax returns); *see also* Right to Financial Privacy Act of 1978, 12 U.S.C. §§ 3401-22 (1994) (limiting financial institutions' ability to disseminate financial records); Debt Collection Act of 1982, 31 U.S.C. §§ 3701(a)(3), (6), 3711(f) (1988) (providing due process protections before federal debt information is released to a private credit bureau); Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g (1988 & Supp. V 1993).

110. 114 S. Ct. 1006 (1994).

111. Federal Labor Relations Auth. v. United States Dep't of Defense, 975 F.2d 1105 (5th Cir. 1994).

112. *United States Dep't of Defense*, 114 S. Ct. at 1015; *see* United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 762-63 (1989) (prohibiting the FBI's disclosure of rap sheets even though much of the information was available to the public through other sources). *See generally* Katz, *supra* note 6, at 565-66 (criticizing the Court's failure to recognize that

some disclosure of intimate details does not extinguish an individual's continuing interest in control over that information.[113]

Thus, even though the state may compel individuals to disclose financial information or blood samples, individuals have an additional interest in keeping such information away from business competitors, private insurance companies,[114] other government agencies,[115] or even gossip mongers. Forced disclosure of information to the government for a particular purpose does not terminate the individual's interest in keeping that information secret from others.

The Eighth Circuit's decision in *Western States Cattle Co. v. Edwards*[116] highlights the problem. A cattle company and two of its officials filed a *Bivens*[117] action under the Fourth Amendment against Department of Agriculture employees for unauthorized disclosure of business records to company customers. The plaintiffs conceded that the Department of Agriculture enjoyed the right to review the business records of a closely regulated firm such as their cattle operation.[118] But they

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people make limited disclosures of private information for particular purposes); Seth F. Kreimer, *Sunlight, Secrets and Scarlet Letters: The Tension Between Privacy and Disclosure in Constitutional Law*, 140 U. PA. L. REV. 1, 34-72 (1989) (examining the public and private consequences of government disclosure of personal information).

113. The common-law development of the tort of public dissemination of private information is ample testament to the harm that can arise from the publication of even truthful information. Warren and Brandeis's seminal article on privacy, *The Right to Privacy*, *supra* note 98, was evidently prompted in part by Warren's abhorrence of gossip. Zimmerman, *supra* note 71, at 295-96. Most jurisdictions permit tort recovery if dissemination would be highly offensive to a reasonable person and is not of legitimate concern to the public. RESTATEMENT (SECOND) OF TORTS § 652D (1976); *see* Zimmerman, *supra* note 71, at 365 ("Thirty-six jurisdictions appear to recognize a private-facts tort.").

State legislatures have passed laws protecting other aspects of privacy. *See, e.g.*, IOWA CODE ANN. § 729.6 (West 1993) (prohibiting employers, labor unions, and licensing agencies from performing genetic testing); OHIO REV. CODE ANN. § 3901.49 (Baldwin 1993) (prohibiting insurance companies from limiting coverage on the basis of genetic testing); OR. REV. STAT. § 659.227 (1993) (prohibiting employers from seeking genetic information regarding employees).

114. For example, insurance companies have refused coverage or raised rates based on genetic information. *See* ANDREWS, *supra* note 75, at 18 (noting that insurers have charged higher rates to individuals with genetic traits of sickle cell anemia); Gostin, *supra* note 75, at 114-17 (raising the possibility that insurers may deny coverage based on genetic characteristics).

115. The Privacy Act attests to this proposition. *See supra* text accompanying notes 106-13.

116. 895 F.2d 438 (8th Cir. 1990).

117. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971) (recognizing a cause of action for privacy violations arising directly under the Fourth Amendment).

118. *Western States Cattle Co.*, 895 F.2d at 441. For analysis of the administrative search doctrine, see generally New York v. Burger, 482 U.S. 691 (1987) (upholding a warrantless search of an automobile junkyard); Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970) (finding that Congress has broad authority to create standards of reasonableness for searches and seizures in the liquor industry but invalidating the search at issue); and Camara v. Municipal Court, 387 U.S. 523 (1967) (suggesting that routine inspection pursuant to a housing ordinance could be based on less than probable cause).

argued that, by subsequently disclosing those records to consumers during an investigation, the Department of Agriculture officials violated a reasonable expectation that the business records would remain private. The court of appeals acknowledged that a Department of Agriculture regulation prohibits unauthorized disclosure of business information,[119] but concluded that "section 201.96 is not a constitutionally required limit on the scope of the warrantless inspections authorized. . . . [I]n assessing the reasonableness of the search itself we are concerned with the search's reasonableness at the time it was conducted."[120] According to the court, therefore, the Fourth Amendment's demand that searches and seizures be reasonable expires at the time of the initial seizure.

Consider as well the Fifth Circuit's recent decision in *United States v. Andrews*.[121] In this case, agents from the Drug Enforcement Agency tracked the movements of a tugboat until it docked in Pascagoula, Mississippi. Andrews was at the dock awaiting the boat's arrival. Federal authorities initiated surveillance of Andrews while crew members repaired the boat. On the third day, federal authorities noticed Andrews driving erratically after visiting several drinking establishments and consequently notified local police. Local police then stopped Andrews and arrested him for driving under the influence of alcohol. They proceeded to take an inventory of items in the car to protect themselves from subsequent damage or loss claims. During the search, the local officer inspected a spiral notebook and concluded that the diagrams inside might aid the DEA's investigation. They did, leading to the discovery of marijuana concealed in the tugboat.[122]

The question raised by the case, however, was not the legitimacy of the inventory search, which apparently complied with standardized criteria,[123] but rather the propriety of the subsequent use of the inventoried items. The local officer did not contend that the notebook was either contraband or likely to be an instrumentality of crime. Rather, he turned over the notebook only because he knew of the federal agents' investigation and harbored a hunch that the diagrams might be relevant.[124] That hunch fell well below the probable cause standard required to seize evidence—even when in plain view—of criminal

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119. 9 C.F.R. § 201.96 (1995).

120. *Western States Cattle Co.*, 895 F.2d at 442. The court also rejected plaintiffs' claims that the disclosures violated their right to privacy as a matter of substantive due process under the Fifth Amendment. *Id.* at 442-43.

121. 22 F.3d 1328 (5th Cir.), *cert. denied*, 115 S. Ct. 346 (1994).

122. *Id.* at 1332-33.

123. *Id.* at 1333-36. The Supreme Court upheld the propriety of inventory searches in South Dakota v. Opperman, 428 U.S. 364, 376 (1976).

124. *Andrews*, 22 F.3d at 1333.

activity.[125] The court dismissed the defendant's challenge on the ground that "[o]nce property has been seized with proper justification . . . the owner no longer has a reasonable expectation of privacy."[126] Thus, according to the court, a legitimate seizure during an inventory search extinguishes all privacy rights in the objects seized. Although the subsequent use in *Andrews* may have been reasonable,[127] the Fourth Amendment should at least require subjecting such use to scrutiny.

Contrast *Andrews* and *Western States Cattle* with the California appellate court decision in *Oziel v. Superior Court*.[128] In *Oziel*, law enforcement officials videotaped the search of the home of Lyle and Eric Menendez's psychotherapist. They successfully searched for evidence relating to the murders of the Menendezes' parents. Included in the videotaped search was the interior of the psychotherapist's house, a glimpse of his wife in a bathrobe, and files disclosing the names of other patients.[129] The trial court assumed the validity of the search and ordered disclosure to the news media of the whole video, excluding tape of any physical evidence linked to the crime and names of other patients.[130]

In reversing the disclosure order, the appellate court relied on the privacy provision in the California Constitution, but found no support in the Fourth Amendment. The court reasoned,

> [i]t is one thing to be forced to submit to a search of one's home under color of warrant; it is quite another matter to be forced to have the whole world accompany [law enforcement authorities] during [their] search by watching a videotape showing everything the [law enforcement authorities] did and saw during the search.[131]

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125. Under the plain view doctrine, government officials can only seize items in plain view if they have probable cause to believe that the items are evidence, fruits, or instrumentalities of crime. Coolidge v. New Hampshire, 403 U.S. 443, 464-73 (1971).

126. *Andrews*, 22 F.3d at 1337 (quoting United States v. Thompson, 837 F.2d 673, 675 (5th Cir.) (footnotes omitted), *cert. denied*, 488 U.S. 832 (1988)). *But see* United States v. Khoury, 901 F.2d 948, 957-60 (11th Cir.) (invalidating the subsequent use of a notebook seized during an inventory search because the "scope of an inventory search may not exceed that necessary to accomplish the ends of the inventory"), *modified*, 910 F.2d 713 (11th Cir. 1990).

127. *See infra* text accompanying notes 195-96.

128. 273 Cal. Rptr. 196 (Ct. App. 1990).

129. *Id.* at 199, 200 n.4.

130. *Id.* at 200.

131. *Id.* at 207. The Second Circuit recently suggested that videotaping a search of a private home for reasons unrelated to the purposes of the search violated the Fourth Amendment. Ayeni v. Mottola, 35 F.3d 680, 688 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 1689 (1995). Similarly, although prison authorities may legitimately conduct strip searches of prisoners, such searches would be unreasonable if a videotape of the searches were disclosed to the press. *See* Buffalo Broadcasting Co. v. New York Dep't of Correctional Servs., 578 N.Y.S.2d 928, 930 (App. Div. 1992) (upholding an order requiring redaction of an Attica prison riot videotape, in order to protect the privacy rights of prisoners), *appeal denied*, 594 N.E.2d 941 (N.Y. 1994); *see also* Commonwealth v. Kean, 556 A.2d 374, 387 (Pa. Super. Ct. 1989) (suggesting that "[t]o be forced to disrobe before a stranger is an invasion of privacy;

The court should have relied on the Fourth Amendment as well; law enforcement authorities may have had a valid reason to record and keep the videotape, but the Fourth Amendment demands that use of the information be reasonable.

Use restrictions accommodate the government's interest in obtaining information with individuals' interest in confining disclosure of private information as much as possible.[132] Indeed, the Supreme Court has developed use restrictions in the Fifth Amendment context, which prevent law enforcement authorities from using a witness's compelled testimony to incriminate the witness in a later criminal proceeding.[133] Compelled testimony can be viewed as a seizure, and while the compulsion itself may be legitimate, the subsequent use of the testimony to inculpate the witness is not. Use restrictions strike a similar balance between individual and governmental interests under the Fourth Amendment.[134]

Regulating governmental use of information under the Fourth Amendment arguably poses an anomaly. Governmental authorities would be more tightly circumscribed in using information obtained through searches and seizures than they would for information in their possession obtained from other sources, such as surveillance activities not amounting to searches and seizures, employment records, or reports from third parties.[135] Governmental agencies amass vast quantities of information

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to be forced to disrobe before a second stranger and a third stranger is a further invasion of privacy," in describing a videotape of sexual acts), *appeal denied*, 575 A.2d 563 (1990).

132. The exclusionary rule is a use restriction stemming from instrumental concerns of deterring unconstitutional conduct. Mapp v. Ohio, 367 U.S. 643, 648 (1961). In contrast, the use restrictions I propose flow from the Fourth Amendment itself. Reasonableness of a seizure under the Fourth Amendment will depend upon the government's use of information and property.

133. *See* Kastigar v. United States, 406 U.S. 441, 444 (1972) (recognizing that the government's power to compel testimony is contingent upon conferral of use immunity); Murphy v. Waterfront Comm., 378 U.S. 52, 79 (1964) (expanding use restrictions under the Fifth Amendment to protect a witness compelled to testify in state proceedings from federal prosecution). In a sense, use restrictions act like a protective order in discovery, permitting disclosure of information for the particular purpose of discovery, but prohibiting any other use of that information.

134. Similarly, law enforcement authorities must release a lawfully arrested individual who is exonerated because the purpose justifying the seizure has ceased. They can only justify continued custody on some other basis that would independently justify the initial arrest, such as probable cause to believe that the individual committed a different crime. No lesser standard would suffice. We naturally assume that any purpose justifying continued detention must be as weighty as the purpose legitimating the initial arrest. Although continued custody of an individual poses more constitutional difficulties than custody of information, the fundamental problem in both contexts is a lack of governmental authority to exercise continued dominion once the purpose for the seizure has ended.

135. The anomaly disappears, however, if one views governmental use of private information as a seizure of an individual's personal effects. *See infra* note 199.

The broader question of what the government can do with information in its possession is as perplexing as it is complex. *See generally* Kreimer, *supra* note 112 (discussing the tension between government disclosure of information and the need to protect sanctuaries of private liberty from state intervention); Paul Schwartz, *Data Processing and Government Administration: The Failure of the American Legal Response to the Computer*, 43 HASTINGS L.J. 1321, 1374-86 (1992) (discussing data

about all of us, much of which we would prefer to shield from public scrutiny.[136]

But a line between acquisition of information obtained through government coercion and information obtained through other means is normatively attractive. Under the Court's current regime, a search and seizure by definition connotes a more serious deprivation of privacy than other efforts to acquire information, even if the information obtained is equally sensitive.[137] Intrusions into homes, surveillance techniques such as wiretapping, and coerced extraction of bodily fluids pose more of a threat to liberty than other governmental acquisition efforts, such as interviewing third parties or obtaining bank records. Because the government uses greater coercive or invasive force to acquire information

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protection laws as a way to balance the government's administrative needs for data against the individual's need to safeguard his other personal information). Perhaps the Due Process Clause should be reinterpreted to restrain government officials in ways similar to what I have described above—officials should only be able to use information consistent with the purpose justifying acquisition of the information.

Indeed, the Supreme Court has suggested that dissemination of sensitive information by the government might violate substantive due process. *See* Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 765 (1986) (addressing privacy concerns implicated when government officials obtain abortion records); *see also* Whalen v. Roe, 429 U.S. 589, 605-06 (1977) (addressing the privacy interest in records disclosing purchases of particular prescription medicines and acknowledging that there is a "threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files"). And in extremely rare cases, lower courts have held that dissemination of private information held by the government violates the Due Process Clause. *See, e.g.*, Doe v. Southeastern Pa. Transp. Auth., Civil No. 93-5988, 1995 U.S. Dist. LEXIS 7629 (E.D. Pa. June 2, 1995) (holding that the Due Process Clause was violated by an agency official's improper review of a drug prescription utilization report of agency employees); Doe v. Borough of Barrington, 729 F. Supp. 376 (D.N.J. 1990) (holding that police authorities' disclosure to others that an individual had AIDS violated the Due Process Clause).

But no court has even intimated that disclosure of the type of information obtained in *Oziel* or *Western States Cattle*—the glimpse of the inside of a house or business records—violates due process. The Due Process Clause would afford far more limited protection to individuals targeted by searches and seizures than would the Fourth Amendment for several reasons. First, the Due Process Clause generally applies solely to purposeful governmental actions and excludes negligent destruction of property, see Daniels v. Williams, 474 U.S. 327, 333 (1986) (holding that injuries sustained through the government's negligence do not violate due process), or dissemination of information, see New Alaska Dev. Corp. v. Guetschow, 869 F.2d 1298, 1305 (9th Cir. 1989) (stating that negligent dissemination of information is not unconstitutional). Second, the Supreme Court has construed the Due Process Clause to contain a higher threshold that is exceeded only by governmental action that unconscionably violates individual autonomy or integrity. Whether or not courts ultimately construe the Due Process Clause to protect against government officials' arbitrary use of all private information in their possession, my argument here is that a reasonableness requirement should at least restrain the government's use of information obtained through searches and seizures.

136. Mark Fall, *Privacy Protections of Computerized Information*, 2 S. CAL. INTERDISCIPLINARY L.J. 165, 167 (1993) (citing the lack of restrictions on government collection of information and polls demonstrating the public's fear of exposure of private information).

137. *See* Stuntz, *supra* note 7, at 1018-19 (listing instances in which the government can acquire sensitive information without triggering Fourth Amendment scrutiny under current doctrine).

through searches and seizures than through other means, additional restraint is warranted.[138]

Moreover, the threat posed by searches to an individual's control over personal information may be as great—if not greater—than that posed by governmental collection of information through other means. The government has more capacity to obtain information when it can use coercion, and the individual may never before have disclosed the private information to the public. The Fourth Amendment itself recognizes the qualitative differences between some governmental acquisition efforts and others; the Amendment was never thought to regulate all governmental acquisition of information, but rather only that involving searches and seizures. Thus, stiffer limitations on governmental use of information obtained through searches and seizures reflect the categorically greater threat posed to privacy (and property rights) when the government can acquire such information or property only through coercion.

III. Restricting Unreasonable Subsequent Uses

In the preceding parts of this Article, I explored two principal justifications for placing use restrictions on the information and property obtained by law enforcement authorities. First, once the Supreme Court discarded the property paradigm for the Fourth Amendment, no rationale remained for freezing the reasonableness inquiry at the moment of the search or seizure. Because the government does not enjoy a superior possessory interest in the seized items or information, the reasonableness of a seizure hinges upon the government's intended use of the items acquired. Second, imposition of use restrictions recognizes that what government officials do with seized information and items may affect an individual's privacy and property rights as much as the seizure itself. Taken together, the two justifications suggest that governmental authorities must use seized information and property in a manner consistent with the reasonableness requirement in the Fourth Amendment. This Part focuses principally upon the controversial subsequent use issues that arise with seizures of information. Subsequent use of seized property currently poses

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138. Others have suggested that the Fourth Amendment be applied principally to protect against the government's unchecked exercise of coercion. *See, e.g.*, *id.* at 1068 (advocating that "police coercion [displace] privacy as a focus of attention in the law of criminal investigation"). In addition, when the government acquires information through compulsion, there may be increased strictures on its action. For instance, if government physicians learn of an individual's disease, no duty to warn is triggered. But when the government acquires the information through coercion, as at an induction physical, greater responsibility ensues. *See* Betesh v. United States, 400 F. Supp. 238, 246-47 (D.D.C. 1974) (finding that Selective Service physicians had a duty to disclose an abnormal x-ray to a prospective armed forces inductee and that the failure to disclose the x-ray was the proximate cause of the inductee's death).

less of a problem because of the strictures imposed by Rule 41(e) of the Federal Rules of Criminal Procedure and similar state rules of practice.

A. Preventing Unreasonable Uses Through Case-by-Case Balancing

Given the two justifications discussed above, courts could implement use restrictions in a number of ways. For instance, courts could assess the reasonableness of the subsequent use apart from any consideration of the balance justifying the initial exercise of coercive or invasive authority. Disclosing intimate information acquired through searches and seizures to the press, as in *Oziel*, might be unreasonable, but using information for law enforcement purposes, as in *Andrews*, would probably pass the reasonableness hurdle. Reasonableness might also depend on whether the collateral use was formulated pursuant to a general or ad hoc determination.[139]

Under current Supreme Court case law, however, this balancing approach seems underprotective. Subsequent uses might be approved, such as use by law enforcement officials, that would have been forbidden if articulated at the time of the seizure, because the Court demands of the government a stronger showing to justify searches and seizures in criminal law enforcement than in other contexts. For instance, in *National Treasury Employees Union v. Von Raab*,[140] the Court narrowly upheld a drug-testing scheme for Customs Service employees as reasonable only after assuming that no criminal law enforcement purpose was possible.[141] The Court reasoned that the Customs Service's interest in monitoring agents who dealt with drug smuggling outweighed the privacy interest involved.[142] For the Customs Service subsequently to use the samples obtained pursuant to the regulatory scheme for law enforcement purposes would make a mockery of the original balancing.[143]

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139. *See infra* text accompanying notes 171-80; *cf.* Amar, *supra* note 28, at 816-17 (discussing legislative and administrative regimes designed to enforce the reasonableness norm).

140. 489 U.S. 656 (1989).

141. *Id.* at 663.

142. *Id.* at 677. The Supreme Court has held that government officials can conduct searches without a warrant and without probable cause if they have "special needs" for the information, unrelated to traditional law enforcement goals. The Court reasoned that "where a[n] . . . intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the government's interests." *Id.* at 665. The Court in Griffin v. Wisconsin, 483 U.S. 868 (1987), upheld the warrantless search of a probationer's home under the same logic, and in New Jersey v. T.L.O., 469 U.S. 325 (1985), it upheld the warrantless search of a student's purse in the secondary school context.

143. Contemporary doctrine, however, has been roundly criticized. *See, e.g.*, Amar, *supra* note 28, at 757-58 (calling Fourth Amendment jurisprudence "misguided," "contradictory," and "often perverse"); Katz, *supra* note 6, at 588 (criticizing the Court for its "revolutionary removal of fourth amendment protection from our lives"). In light of the recent decisions eroding the probable cause requirement, *see supra* note 142 and *infra* note 195, the problem of differential standards might be short-lived.

Moreover, to the extent that the government can use information and property seized for additional purposes down the road, its incentive to undertake searches increases. Law enforcement officials might encourage many types of searches, such as inspections in public housing projects or regulatory inspection of auto parts dealers, with the hope of uncovering useful information.[144] And, if officials can keep all property seized, then the frequency of such searches will likely increase.[145]

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144. Permitting a second balance unconnected to the accommodation underlying the initial seizure magnifies the current problem of pretextual searches. Administrative officials may seize information not only to benefit an administrative purpose, but a law enforcement purpose as well. The Colorado Supreme Court decision in People *ex rel.* P.E.A., 754 P.2d 382 (Colo. 1988) (en banc), is representative. In that case, school officials searched a student at the prompting of a police officer. The officer had received a tip that several students had brought marijuana to school to sell. The officer informed the principal, who searched the two students mentioned, while the officer remained on the premises. The search was unsuccessful, but the two students implicated a third student. Upon searching that student's car, the principal and school security officer discovered marijuana. Even though the court assumed that no probable cause existed for the search, the court concluded that, because the police officer did not "request or in any way participate in the searches or interrogations of the students," the search was permissible as an administrative search. *Id.* at 385; *see also* Cason v. Cook, 810 F.2d 188 (8th Cir.) (holding a search to be permissible even though a police officer was present and participated in part in a search by school officials), *cert. denied*, 482 U.S. 930 (1987). The risk of a pretextual search by school officials increases in those communities that station full-time police officials within schools. More than 40 school districts across Texas have formed their own police forces. Melanie Markley & John Williams, *School Police Get More Power; Governor Signs Law that Expands Jurisdiction Off Campus*, HOUSTON CHRON., May 22, 1993, *available in* LEXIS, News Library, HCHRN File.

Similarly, parole or probation officers often make warrantless searches at the instigation of law enforcement authorities bent on furthering an ongoing investigation. *See, e.g.*, United States v. Harper, 928 F.2d 894, 897 (9th Cir. 1991) ("[P]olice and parole officers are entitled to work together to achieve their objectives; concerted action does not in and of itself make a search constitutionally infirm."). The more expansive the administrative search, the greater the likelihood that governmental officials will collect evidence of ultimate benefit in law enforcement.

145. For instance, the Ninth Circuit has struck down an arrangement under which law enforcement officers provided a reward to airport security officers every time they uncovered, during routine weapons screening, a passenger carrying large sums of currency. United States v. $124,570 U.S. Currency, 873 F.2d 1240 (9th Cir. 1989). Consider also the likely incentive effect if law enforcement authorities could sell any property or information unearthed through legitimate searches. *See* Mary Murphy, *Grand Jury Hears from at Least 5 in Vogel Probe*, ORLANDO SENTINEL, June 3, 1994, *available in* LEXIS, News Library, ORSENT File (reporting that while the sheriff's department had seized more than $8 million in five years from motorists, of which 70% were minorities, the department had filed charges on less than half of the drivers); Donna O'Neal & Jeff Brazil, *Panel to Probe Seizures*, ORLANDO SENTINEL, July 9, 1992, at A1 (revealing that most challenges of cash seizures were settled out of court, with the sheriff's office keeping half of the amount seized); Mark Sell, *More Regulation, More Enforcement, More Crime: Curbs Fail to Restrain Money Laundering*, MIAMI DAILY BUS. REV., June 4, 1993, *available in* LEXIS, News Library, BUSDTL File (reporting that proceeds collected by federal agencies in connection with money-laundering schemes are funneled back into local police departments); Michael Slackman et al., *Suffolk DA Catterson Has Put Millions in Crime Money into an Off-the-Books System*, NEWSDAY, Sept. 27, 1992, at 5 (describing how one district attorney used forfeited money for his personal benefit). The same incentive exists for other collateral uses, even if less extreme. Agencies, for instance, might not test their employees for drug use as frequently if they could not share with others information uncovered through urinalyses of its employees. Administrative officials similarly would have, at the margin, less incentive to conduct

Ultimately, the problem with second-stage balancing is that government officials could too easily parlay an administrative search into a law enforcement effort because the law enforcement need will almost always outweigh any vestigial privacy interest in the items previously seized by administrative officials. Once relevant information is in the government's hands, the ensuing balance likely will tip in the government's favor.

In short, the reasonableness of the collateral use should turn in part on how the government obtained the information initially. The individual's interest may vary not only with the nature of the information, but also with the reasons for which the information was originally obtained. To some, for instance, it may be unreasonable for the government to place information gleaned from a regulatory search in a law enforcement data bank, but reasonable if the information were obtained through an unrelated criminal investigation. To others, it may be unreasonable for the government to place information gleaned from a third-party search in a data bank but reasonable if the information were obtained from a suspect. Under current doctrine, the government's reduced burden at the second stage might provide too great an incentive for government officials to carry out administrative searches. Thus, any balancing should at least consider the circumstances under which the government acquired the information.

An alternative balancing approach would attempt to ascertain whether the seizure initially would have been justified if the government had articulated the subsequent use. The question would then be whether the secondary use implicates additional privacy concerns, and if so, whether the additional intrusion so changes the underlying balance of interests as to make the seizure unreasonable.

Consider the Supreme Court's decision in *Skinner v. Railway Labor Executives' Ass'n*.[146] The Court upheld Federal Railroad Administration regulations that mandated blood and urine tests of covered employees following major collisions and authorized testing of covered employees who violate certain safety rules.[147] In rejecting a Fourth Amendment challenge, the Court acknowledged that the tests permitted "the Government to learn certain private medical facts that an employee might prefer not to disclose,"[148] such as "whether he or she is epileptic, pregnant, or diabetic."[149] But because there was no evidence that the government planned to use "the information for any other purpose" besides the drug

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searches of auto junkyards if they could not pass on suspicions learned from seizures of records to other regulatory agencies. A categorical ban on undisclosed uses ensures that the government will use coercive force only when justified by its articulated objectives.

146. 489 U.S. 602 (1989).

147. *Id.* at 606, 634.

148. *Id.* at 626 n.7.

149. *Id.* at 616-17.

testing, the Court concluded that the testing invaded no significant privacy interest.[150]

But what if government officials later changed their minds and used the tests to gauge the employability of the railroad employees based on their medical profiles? Governmental officials not infrequently discover new purposes for information already in their files, particularly as technology or political priorities change.[151] Reviewing courts would have to address whether the original seizure of samples would have been reasonable had the additional governmental objective been known.

This second balancing approach likely results in insufficient protection for privacy. The privacy concerns implicated may well be systemically undervalued because of the difficulty in assessment. No metric exists to measure the extent of privacy invasion. For instance, there is no consensus whether privacy is seriously violated by the additional use of identifiers, such as DNA prints and Social Security numbers, or by the disclosure of records seized by one agency to another. Similarly, no guideposts set out which details gleaned from a criminal investigation can be divulged to the press.[152] Unlike property losses, one cannot easily measure harm to privacy or autonomy.[153]

Even if the injury could be assessed, a decisionmaker would have to determine whether any incremental difference would alter the original balance underlying the reasonableness determination.[154] In comparison to the seemingly amorphous privacy interests at stake, the governmental

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150. *Id.* at 626 n.7. The significance of the Court's reference to subsequent use is unclear. To the extent that the Court meant to suggest that subsequent uses do not fall within the purview of the Fourth Amendment—as the lower court held in *Western States Cattle*—a seizure only need be reasonable at the time it is executed. Alternatively, the Court may never have focused on the subsequent use issue. The mention of potential uses may indicate only that such uses were not then ripe for challenge.

151. *See* FLAHERTY, *supra* note 18, at 375 ("The fundamental premise, indeed the bureaucratic imperative, is that new uses for automated information systems will always develop, once they are in existence.").

152. For a recent example, see Athelia Knight, *Moeller Suspended During Investigation; Michigan Officials Looking into Coach's Arrest*, WASH. POST, May 4, 1995, at B4 (reporting that police officials divulged to the press an audio tape disclosing a university football coach's tearful plea, recorded at a hospital where he had been transported by police because of possible liquor poisoning).

153. Any balancing approach is also problematic because technological innovations erode the expectations of privacy that everyone enjoys. DNA blood testing by insurance companies, for instance, paves the way for the government to obtain DNA prints not only from suspects, but from employees. *See* Sundby, *supra* note 8, at 1758-63 (observing that technological advances make it more likely that the balance will tip in favor of upholding governmental invasions of privacy, both by reducing public expectations of privacy and by lessening the intrusiveness of a given search). Indeed, in light of the difficulty in measuring harm to privacy, any system should be structured to prevent injuries to privacy rather than to redress them after the fact.

154. *See* Silas J. Wasserstrom & Louis M. Seidman, *The Fourth Amendment as Constitutional Theory*, 77 GEO. L.J. 19, 48 (1988) ("[I]ndividualized, retrospective balancing provides little prospective direction to police officers.").

objective may be quite tangible,[155] and the privacy interest can get lost in the shuffle. Moreover, because the original balance already tipped toward the state, a subsequent decisionmaker may be biased toward upholding the previous balance even though new factors exist. Unless substantial damages were available, which I doubt would be the case,[156] officials would have little reason—except in extraordinary cases—to desist from a proposed use.[157] Thus, although feasible, this second type of balancing approach—retroactive balancing—might also provide insufficient protection for privacy and would, in any event, be costly to administer.

B. Legislative Balancing

A third approach might involve legislative balancing. Instead of relying on case-by-case adjudication, the legislature could determine which subsequent uses to allow. Congress to some extent has followed this path under the Privacy Act,[158] which controls the government's use of information pertaining to an individual's educational and financial background, medical and employment history, and criminal record. The Act limits an agency's authority to disclose information about an individual to other agencies or private parties without the individual's consent.[159] Absent consent, the Act authorizes disclosure only for "routine uses" of

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155. The Court, to date, has not evaluated governmental objectives with particular vigor. *See generally* David L. Faigman, *Reconciling Individual Rights and Governmental Interests: Madisonian Principles Versus Supreme Court Practice*, 78 VA. L. REV. 1521, 1578, 1574-78 (1992) (criticizing the Court's application of balancing tests to the Fourth Amendment and its "failure to adequately scrutinize the government's interests when a fundamental right is at stake"); Sundby, *supra* note 8, at 1765-71 (describing how adoption of a reasonableness balancing test has led to an erosion of Fourth Amendment privacy rights).

156. Damages against an individual official are unlikely to be awarded in close cases because of the immunity doctrine. *See generally* Harlow v. Fitzgerald, 457 U.S. 800, 806 (1982) ("[O]ur decisions consistently have held that government officials are entitled to some form of immunity from suits for damages.").

157. On the other hand, if substantial damages were available, government officials might be overdeterred from legitimate use by the prospect of financial harm. *See generally* Ronald A. Cass, *Damage Suits Against Public Officers*, 129 U. PA. L. REV. 1110, 1153, 1153-74 (1981) (examining "the possible overdeterrence effects of liability and responses that might limit those effects"); Jerry L. Mashaw, *Civil Liability of Government Officers: Property Rights and Official Accountability*, 42 LAW & CONTEMP. PROBS. 8, 26-33 (1978) (arguing that some civil liability against government officials is appropriate). Officials might be loathe to share or generate information that would benefit the public because of a potential Fourth Amendment challenge. Damage awards might also interfere with government policymaking—though differently—if the damages are imposed directly against the government itself, as under the Federal Tort Claims Act, 28 U.S.C. § 2680(h) (1988). *See generally* Harold J. Krent, *Preserving Discretion Without Sacrificing Deterrence: Federal Government Liability in Tort*, 38 UCLA L. REV. 871 (1991) (arguing that tort liability against the government can skew policymaking in several respects).

158. 5 U.S.C. § 552a (1994).

159. *Id.* § 552a(b). The statute, of course, does not only apply to information that is acquired through searches and seizures.

information,[160] for civil or criminal law enforcement purposes,[161] for census-related activities,[162] and certain other specified purposes. Even if a judge would uphold a proposed use as reasonable, an agency cannot disclose the information unless it falls within one of the stated exceptions. The Privacy Act thus embodies a legislative determination of the reasonableness of particular collateral uses of information acquired by the government.[163]

Legislative determination of permissible subsequent uses would be an important step in recognizing the need to restrict the use of information in government files. But the legislature might not draw appropriate lines to protect the individual's continuing interest in information possessed by the government. For instance, the Privacy Act places no restrictions whatsoever on criminal law enforcement use, regardless of how the government obtained the information. And the definition of routine use has evidently expanded exponentially.[164] Pleas for governmental efficiency may too easily override concern for individual rights.

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160. *Id.* § 552a(b)(3), (e)(4)(D).

161. *Id.* § 552a(b)(7).

162. *Id.* § 552a(b)(4).

163. Some statutes have limited the purposes for which information generated under their terms can be used. *See, e.g.*, Tax Reform Act of 1976, 26 U.S.C. § 6103(a) (1988 & Supp. V 1993) (protecting the confidentiality of tax records by restricting disclosure for nontax purposes). No statute of which I am aware, however, precludes use of the information for law enforcement purposes. *See, e.g., id.* § 6103(i) (authorizing the disclosure of tax return information pursuant to a federal district court order for use in criminal investigations).

164. Evidently, a routine use is any use that the agency desires and makes known ahead of time. For criticism of how agencies have construed the routine use exception, see JERRY BERMAN & JANLORI GOLDMAN, A FEDERAL RIGHT OF INFORMATION PRIVACY: THE NEED FOR REFORM 15, 14-16 (1989) ("The government's sweeping interpretation of the [routine use] exemption contradicts the [Privacy] Act's core provision—that, as a general matter, information collected for one purpose may not be used for a different purpose without the individual's consent."); FLAHERTY, *supra* note 18, at 323 ("[T]he head of the agency . . . is the ultimate arbiter of what [routine use] means."); OFFICE OF TECHNOLOGY ASSESSMENT, *supra* note 104, at 18-19, 108 (examining and advocating proposals for constraining agencies' discretion in applying the routine use exception).

Some courts have been sensitive to the problem. Consider the facts in Britt v. Naval Investigative Serv., 886 F.2d 544 (3d Cir. 1989). There, a special agent of the Immigration and Naturalization Service (INS) brought suit against the Naval Investigative Service for divulging information obtained in a criminal investigation of him, which did not result in any charges filed, to his employer, the INS. The government defendants argued that the "routine use" exception to the Privacy Act shielded the disclosure. *Id.* at 547. To fall within that exception, however, the disclosure must be "for a purpose which is compatible with the purpose for which [the information] was collected." 5 U.S.C. § 552a(a)(7) (1994). Because Congress intended the Privacy Act in part to "prevent the federal government from maintaining in one place so much information about a person that that person could no longer maintain a realistic sense of privacy," the court concluded that there must be "some meaningful degree of convergence, between the disclosing agency's purpose in gathering the information and in its disclosure." *Britt*, 886 F.2d at 550, 549-50; *see also* Covert v. Harrington, 876 F.2d 751, 755 (9th Cir. 1989) (suggesting that collecting information for security-clearance purposes might be incompatible with disclosing it for criminal investigation purposes).

Moreover, there is reason to be suspicious of legislative regulation of privacy[165] when problems such as rampant crime confront legislators. Legislators may sacrifice the privacy interests of those most likely to commit criminal offenses in order to gain popularity with voters. Voters may have little empathy for individuals targeted as potential criminal law violators, and the perceived correlation between crime and race exacerbates the problem.[166] It comes as no surprise, for instance, that Congress and the Sentencing Commission chose to punish crack offenders much more severely than those trafficking in cocaine powder.[167] In addition, because of the connection between poverty and crime, most of those caught in the web of police surveillance or suspicion are not large campaign contributors.[168] Needless to say, felons do not generally vote and have scant representation in the political process.[169] Thus, a legislative solution

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165. The legislature as well may be slow to address the impact on privacy of rapidly changing technology. *See, e.g.*, Richard D. Marks, *Security, Privacy, and Free Expression in the New World of Broadband Networks*, 32 HOUS. L. REV. 501, 515 (1995) ("The rapid evolution of digital technology passed beyond the limits of existing legislation long ago, and the present legislative scheme, by and large, is inadequate to protect the privacy of business and personal communications.").

166. *See, e.g.*, BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 198 (113th ed. 1993) (reporting that 29% of all people arrested and 54.8% of people arrested for murder and nonnegligent manslaughter in 1991 were black); *Developments in the Law—Race and the Criminal Process*, 101 HARV. L. REV. 1472, 1496 (1988) ("Although racially disparate crime rates might well be rooted in incidental factors, many police officers believe that race itself provides a legitimate basis on which to base a categorically higher level of suspicion."); Douglas A. Smith et al., *Equity and Discretionary Justice: The Influence of Race on Police Arrest Decisions*, 75 J. CRIM. L. & CRIMINOLOGY 234 (1984) (presenting empirical analyses of the relationship between race and arrest decisions).

167. *See* 21 U.S.C. § 841(b)(1)(B)(ii)-(iii) (1988) (providing that one gram of crack cocaine earns the same penalty as 100 grams of cocaine powder); *see also* United States v. Johnson, 40 F.3d 436, 439 (D.C. Cir. 1994) ("Under the penalty structure . . . one gram of crack cocaine is equivalent to 100 grams of cocaine powder."), *cert. denied*, 115 S. Ct. 1412 (1995); United States v. Coleman, 24 F.3d 37 (9th Cir.) (holding that the imposition of a stiffer penalty for crack cocaine would not violate the Equal Protection Clause even if it had a disparate impact on African Americans, absent a showing of discriminatory intent), *cert. denied*, 115 S. Ct. 261 (1994).

168. *See* Richard Klein, *The Eleventh Commandment: Thou Shalt Not Be Compelled to Render the Ineffective Assistance of Counsel*, 68 IND. L.J. 363, 379 n.102 (1993) ("Eighty-five percent of criminal defendants in the District of Columbia financially qualify for court-appointed counsel."); Jeffrey H. Rutherford, Comment, Dziubak v. Mott *and the Need to Better Balance the Interests of the Indigent Accused and Public Defenders*, 78 MINN. L. REV. 977, 986 n.48 (1994) (reporting that public defenders represent at least 80% of felony defendants in the counties encompassing Minneapolis and St. Paul). *See generally* JOHN H. ELY, DEMOCRACY AND DISTRUST 97 (1980) (defending judicial review of the criminal law enforcement field using the representation reinforcement theory and noting that law enforcement officials are not subject to significant public scrutiny of their search and arrest procedures); Morgan Cloud, *Pragmatism, Positivism, and Principles in Fourth Amendment Theory*, 41 UCLA L. REV. 199, 284-85 (1993) (stressing that those accused of criminal wrongdoing rarely have effective access to the legislative process).

169. All but three states deny incarcerated felons the right to vote, and 35 disenfranchise nonincarcerated felons during their sentence (including those on probation or parole). Andrew L. Shapiro, Note, *Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy*, 103 YALE L.J. 537, 538-39 (1993). Sixteen states bar felons from voting for life. *See* ALA. CONST.

appears insufficient—by itself—to protect against unreasonable use of information obtained through searches and seizures.

C. *A Categorical Ban on Previously Undisclosed Uses*

Although the legislative solution may not be ideal, the central idea of legislative or administrative precommitment to particular collateral uses is worth preserving. Like a legislative solution, prohibiting all collateral uses not previously articulated by the government would avoid much of the uncertainty inherent in the case-by-case balancing schemes previously discussed.[170] Only one judicial assessment at the time of the initial seizure would be required. But, unlike the legislative scheme, a categorical ban on previously undisclosed uses would facilitate judicial review at the time of seizure to safeguard privacy interests.[171]

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art. VIII, § 182; ARIZ. CONST. art. 7, § 2 (exception for first-time offenders); DEL. CONST. art. V, § 2; FLA. CONST. art. 6, § 4; IOWA CONST. art. 2, § 5; KY. CONST. § 145; MD. ANN. CODE art. 33, § 3-4 (1993) (exception for first-time offenders); MISS. CONST. art. 12, § 241; NEV. CONST. art. 2, § 1; N.H. CONST. pt. 1, art. 11 (treason, bribery, and election offenses only); N.M. CONST. art. VII, § 1; TENN. CONST. art. I, § 5; UTAH CONST. art. IV, § 6 (treason and election offenses only); VA. CONST. art. II, § 1; WASH. CONST. art. VI, § 3; WYO. CONST. art. 6, § 6. *See also* Alice E. Harvey, *Ex-Felon Disenfranchisement and Its Influence on the Black Vote: The Need for a Second Look*, 142 U. PA. L. REV. 1145 (1994) (arguing that disenfranchisement dilutes minority voting power).

170. *See supra* notes 139-57 and accompanying text. Individuals could enforce the use restrictions in one of several ways. If the government uses information obtained for purposes unconnected to those justifying the seizure, then the individual could seek an injunction or, in cases of palpable wrongdoing, damages against the officials in their individual capacities through a *Bivens* action. If the government uses the information for law enforcement purposes, the injunction could take the form of a suppression motion.

171. A more drastic remedy would be to order that the information be expunged from the government's files after its planned use had been completed, as is done for improper arrests. *See, e.g.*, Patterson v. FBI, 893 F.2d 595 (3d Cir.) (detailing the FBI's offer to expunge from its files the name of a sixth-grade student whose correspondence with foreign governments as part of a school project sparked the FBI's interest), *cert. denied*, 498 U.S. 812 (1990); Haase v. Sessions, 893 F.2d 370 (D.C. Cir. 1990) (detailing the FBI's agreement to return notes illegally seized from a journalist and to destroy all existing records of the notes); Reyes v. Supervisor of DEA, 834 F.2d 1093, 1096-97 (1st Cir. 1987) (allowing an individual to pursue a claim for expungement of his arrest record). Expungement would limit the danger that future government officials could use information in the government's files to harm the privacy of those covered. Expungement, however, might be both too stringent and too lax a remedy. First, expungement denies the government reasonable use of the information consistent with the purpose for which it was obtained. For instance, the government might wish to save the urine samples collected in *Skinner* to permit re-analysis of the sample if another laboratory reported detection of a substance for which the sample was not originally test, Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 621 n.5 (1989), or perhaps as part of a sample group to determine the accuracy of other test results. Alternatively, the samples might be used for scientific experiments unrelated to drug use, with any identifying labels removed. Such ancillary uses might be implicit in the underlying determination that the search and seizure was reasonable.

On the other hand, expungement might not be effective in some contexts in protecting individual privacy sufficiently. Government officials might be able to use information in ways inconsistent with privacy, even if record of the information has been destroyed. Information obtained through a search and seizure can be orally passed on to other government agencies, to the subject's employers, or to the press. *Cf.* Kastigar v. United States, 406 U.S. 441, 460 (1972) (noting that in the absence of total

1. Process Advantages of Precommitment to Particular Uses.— Requiring the government to precommit to its uses of information and items seized—as under the Privacy Act—encourages greater deliberation and fosters more open decisionmaking. Given the importance of privacy concerns, overarching governmental policy—not the whim of a low-level official—should determine the government's subsequent uses. If the legislature or agency has not authorized a particular use in advance, there is a greater chance that the course of action reflects hastiness or a lack of due deliberation. In other words, any effort by the government to use information or property for a previously undisclosed purpose should be considered unreasonable.

The advantages of forcing prior articulation are considerable. Government authorities must set policy to control a wide range of circumstances. They cannot be swayed by the benefits of a particular use in a given case. Moreover, authorities can less likely single out an individual for disadvantageous treatment. Prospectivity minimizes the chances for arbitrary action or action motivated by hidden bias.

For instance, consider the growing trend in criminal law enforcement to establish DNA data banks from blood samples drawn from persons likely to commit violent crimes that may produce DNA evidence, such as blood or skin tissue.[172] Almost half the states have adopted some form of DNA data bank,[173] and Congress approved a measure authorizing appropriations averaging eight million dollars annually for the next five years to encourage states to establish and continue the data banks.[174] So far, courts have upheld the constitutionality of extracting the blood of felons for inclusion in DNA data banks.[175] When the state legislature

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prohibition of governmental use of private information, citizens are dependent on the good faith of governmental officials).

172. *See generally* OFFICE OF TECHNOLOGY ASSESSMENT, GENETIC WITNESS: FORENSIC USES OF DNA TESTS 32-34 (1990) (discussing Congress's options for dealing with the growth of DNA testing, the FBI's development of DNA data bank software and hardware, and critics' concerns about technological inflexibility and infringements on civil liberties).

173. *See, e.g.*, ARIZ. REV. STAT. ANN. § 31-281 (Supp. 1994); CAL. PENAL CODE § 290.2(f)(1) (West Supp. 1995); COLO. REV. STAT. § 17-2-201(5)(g)(I) (Supp. 1994); FLA. STAT. ANN. § 943.325 (West Supp. 1995); GA. CODE ANN. § 24-4-60 (Supp. 1994); HAW. REV. STAT. § 706-603 (Supp. 1992); ILL. ANN. STAT. ch. 730, para. 5-4-3 (Smith-Hurd Supp. 1995); IND. CODE ANN. § 20-12-34.5 (West Supp. 1995); IOWA CODE ANN. § 13.10 (West 1989); KAN. STAT. ANN. § 21-2511 (Supp. 1994); KY. REV. STAT. ANN. § 17:175 (Michie/Bobbs-Merrill 1992); MICH. COMP. LAWS ANN. § 750.520m (West 1991); MINN. STAT. § 609.3461 (1994); MO. REV. STAT. § 650.050 (Supp. 1992); NEV. REV. STAT. § 176.111 (1991); OKLA. STAT. tit. 57, § 584 (1991); OR. REV. STAT. §§ 181.085, 137.076 (1993); S.D. CODIFIED LAWS ANN. § 23-5-14 (Supp. 1994); TENN. CODE ANN. §§ 38-6-113, 40-35-321 (1991 & Supp. 1994); VA. CODE ANN. § 19.2-310.2 (Michie Supp. 1994); WASH. REV. CODE ANN. §§ 43.43.752-.759 (West Supp. 1995); WIS. STAT. ANN. § 973.047 (West Supp. 1994).

174. DNA Identification Act of 1994, Pub. L. No. 103-322, § 210302, 1994 U.S.C.C.A.N. (108 Stat.) 2065, 2068 (to be codified generally at 42 U.S.C. §§ 3793, 13701).

175. *E.g.*, Rise v. Oregon, 59 F.3d 1556 (9th Cir. 1995) (upholding a statute requiring blood samples from persons previously convicted of murder or a sexual offense); Jones v. Murray, 962 F.2d

establishes a DNA data bank, the data bank's existence and coverage are openly debated and subject to the political process.

What if government officials, after requiring a blood sample at birth in order to test for certain diseases,[176] extract DNA material from that sample for future law enforcement use?[177] The decision to use blood samples in the government's possession for other uses may be made by a low-level official alone, without any significant debate within the agency or among the public at large. For example, politically accountable officials did not make the Department of Agriculture's decision to share information seized from Western States Cattle.[178] Officials investigating the company divulged the information—presumably to warn the customers of the company's dubious practices—but no political checks restrained that decision. Thus, requiring disclosure of all proposed uses channels governmental action through the political process because all uses must be articulated as government policy prior to the seizure.

2. External Review.—Forcing the government to articulate all intended uses at the time of the seizure facilitates judicial review. As discussed previously, courts currently cannot meaningfully balance the governmental and individual interests involved in a particular seizure without analyzing the proposed governmental uses of the items and information seized.[179] If the government were required to articulate all proposed uses at the time of seizure, then the courts' initial balancing efforts would be more meaningful. Courts would no longer need to

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302 (4th Cir.) (holding that a Virginia statute requiring blood samples from all felons for a DNA database did not violate the Fourth Amendment), *cert. denied*, 113 S. Ct. 472 (1992); State v. Olivas, 856 P.2d 1076 (Wash. 1993).

176. Some states have required DNA testing for newborns. *See generally* LORI B. ANDREWS, STATE LAWS AND REGULATIONS GOVERNING NEWBORN SCREENING (1985).

177. Establishment of DNA data banks would in all likelihood become far more controversial if the state attempted to procure blood samples not from convicted felons, but from those in society it deems likely to commit violent crimes in the future. Some studies have found strong correlations between future violent behavior and mental illness, race, gender, age, social class, and geography. *See* MARVIN E. WOLFGANG ET AL., DELINQUENCY IN A BIRTH COHORT 91-92 (1972) (proposing that race is a greater predictor than income of violent behavior); George S. Bridges & Joseph G. Weis, *Measuring Violent Behavior: Effects of Study Design on Reported Correlates of Violence*, *in* VIOLENT CRIME, VIOLENT CRIMINALS 14 (Neil A. Weiner et al. eds., 1988); John Monahan, *Risk Assessment of Violence Among the Mentally Disordered: Generating Useful Knowledge*, 11 INT'L J.L. & PSYCHIATRY 249 (1988) (reviewing methodological problems in previous research).

Indeed, researchers have tentatively established a link between genes and propensity for violence. Sheryl Stolberg, *Gene Linked to Aggressive Behavior*, CHI. SUN TIMES, Oct. 22, 1993, *available in* LEXIS, News Library, CHISUN File. In the past, the FBI has profiled the characteristics of those in its view likeliest to be arsonists, rapists, and serial killers. OFFICE OF TECHNOLOGY ASSESSMENT, *supra* note 104, at 89-90.

178. *See supra* text accompanying notes 116-20.

179. *See supra* subpart II(B).

speculate about proposed uses, as in *Skinner* or *Von Raab*, and could better accommodate the respective interests. Furthermore, forcing pre-commitment to particular uses would avoid the difficulties that arise from rebalancing the privacy and governmental interests at the time of the collateral use.

In turn, external review may be important in confining governmental authorities to reasonable use of information and property seized. A second-stage balancing approach may systemically slight privacy values, and a legislative balancing scheme, by definition, does not allow independent scrutiny of the reasonableness of permissible uses in particular cases. The reasonableness of a proposed collateral use, such as future law enforcement, may well hinge on the specifics of a particular case—how the information was obtained, how widely the information has been previously disseminated, or how critical the law enforcement objective is.[180]

The process and external review benefits of forcing government agents to articulate their purposes up front are not unique to the seizure context. The warrant requirement, at least as construed by the Supreme Court,[181] similarly constrains governmental discretion by mandating that officials assert the purposes and aims of the search *before* the search takes place. The government's objectives can then be probed and debated, guaranteeing some protection for those subject to governmental coercion. Magistrates review those reasons prior to the search, thereby deterring some thoughtless or vindictive searches.

By creating a record prior to the search, the warrant requirement prevents law enforcement personnel from changing the justification for, and the permissible scope of, the search once it is under way. If law enforcement authorities, for instance, come to believe that a suspect is not only trafficking in assault weapons but also in counterfeit food stamps, they cannot, while searching for assault weapons, empty desk drawers to search for the stamps. Instead, they must hold to the purposes previously articulated in the warrant. The ex ante requirement of a particularized warrant demands continuity—the search, for the most part, is limited to the purposes, places, and individuals detailed in the warrant. Obviously, there are many exceptions to this requirement,[182] such as searches incident to

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180. In addition to protecting against unchecked collateral uses, a categorical ban serves as an overall restraint on governmental exercise of coercive or invasive force. *See supra* text accompanying notes 132-38.

181. *See generally* Amar, *supra* note 28, at 761-84; TAYLOR, *supra* note 38, at 19-114 (both providing historical and critical analysis of the role of warrants in United States jurisprudence).

182. A requirement of continuity can be important even when warrants are not required. Warrants, for instance, are not needed in exigent circumstances. If time is short or evidence evanescent, law enforcement officials may search a home or place of business without a warrant. But law enforcement officials cannot rely upon that exigency to conduct a full search unrelated to the original purpose of the search.

arrest[183] and inventory searches,[184] as well as the plain view doctrine,[185] but the Warrant Clause nonetheless serves an important function in restraining officials' power.[186]

The allure of a continuity requirement to circumscribe searches by law enforcement officials—largely confining officials conducting searches to purposes previously articulated—is not surprising given the broad stress on continuity in administrative law generally. Reviewing courts will only allow agencies to defend their actions on the basis of reasons articulated prior to judicial review. As conditions or personnel change, agencies cannot substitute a different rationale without reopening proceedings. If agencies reopen the proceedings, then they must subject their new reasoning to challenge by interested parties in either a rulemaking proceeding[187] or an adjudication. A continuity requirement prevents circumvention of the process checks that control administrative action.

Consider the Supreme Court's decision in Arizona v. Hicks, 480 U.S. 321 (1987). Officers entered an apartment to investigate a shooting. Upon gaining entry, they copied down the serial numbers on the target's stereo, suspecting the stereo to be stolen. The Court held that, even though the additional privacy intrusion in turning over the stereo was minimal once the police legitimately were in the apartment, the police lacked justification for that search. *Id.* at 325. Law enforcement authorities could not transform an exigent search to investigate a shooting into a search for stolen goods. *Id.* Admittedly, if the serial numbers were in plain view, the Court likely would have held that recording the numbers would not have been a search. *Id.* at 326. Still, the Court probably would not have permitted a seizure at that time because the officials did not then have probable cause to believe that the equipment had been stolen. *Id.*; *see also* Mincey v. Arizona, 437 U.S. 385, 393-94 (1978) (finding that once exigent circumstances lapse, law enforcement authorities must terminate a warrantless search).

183. *See* Chimel v. California, 395 U.S. 752 (1969) (outlining the permissible scope of searches incident to arrest).

184. *See* South Dakota v. Opperman, 428 U.S. 364, 369-71 (1976) (finding that the routine practice of taking an inventory of an automobile's contents after impoundment did not violate the Fourth Amendment).

185. *See* Coolidge v. New Hampshire, 403 U.S. 443, 456 (1971) (acknowledging an exception to the warrant requirement for the search and seizure of evidence in "plain view").

186. Judicial evaluation of a search in the context of a motion to exclude the evidence or of a motion for damages may not operate as effectively. Putting aside for a moment the problem of police perjury, it may often be impossible after the fact to determine the extent of prior police knowledge. Ascertaining what officials had reason to know and what they in fact were attempting to uncover through their search is a costly enterprise, and one in which errors are likely to benefit law enforcement authorities. *See* William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 911-18 (1991) (stating that both judicial bias and police perjury in exclusion cases favor the government). Whenever law enforcement authorities uncover incriminating evidence, the bias toward concluding that the search revealing incriminating information was reasonable is strong. *Id.* at 914. The potential of police perjury exacerbates the problem. Holding officials to their statement of purpose and scope in the warrant thus fosters respect for the law. Warrants provide for continuity by requiring the government to abide by the goals and scope of the search specified in advance. Warrants may serve other functions as well. *See generally id.* at 897-918 (arguing that warrants facilitate the award of damages for illegal searches and the determination of whether to exclude evidence).

187. For notice and comment rulemaking under the Administrative Procedure Act, see 5 U.S.C. § 553 (1994).

Moreover, as with the warrant requirement, continuity in administrative law facilitates external review by focusing the reviewer's attention on reasons articulated in the record.[188] A court need not consider every conceivable rationale for the action, nor speculate as to the persuasiveness of justifications not appearing in the record.

The Supreme Court's decision in *SEC v. Chenery Corp.*[189] illustrates this point. The SEC conditioned its approval of a public utility holding company's reorganization on the officers' willingness to disgorge shares of preferred stock they had purchased during the reorganization period. The SEC had not found any wrongdoing, but based its demand upon court cases exploring the common law duty of fiduciaries. The Supreme Court vacated the SEC's decision, holding that the administrative agency had misread judicial precedents.[190] The Court refused to speculate whether any other reasons justified the agency's conclusion: "The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."[191] Alternative grounds were readily apparent, and the Supreme Court upheld the agency's subsequent determination, predicated on different reasoning, to maintain the same condition on the utility company's reorganization.[192] Nonetheless, the *Chenery* principle restrains agency discretion by forcing the agency to rely on justifications found in the record.

The *Chenery* principle thus acts something like a warrant. Both rules provide administrative actors with an incentive to think more carefully before exercising coercive power. Moreover, a continuity requirement facilitates meaningful external review by limiting review to the justifications previously articulated and probed. The requirement of continuity also holds government officials to previously specified reasons,

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188. Agencies lack enforcement power, so external review usually precedes exercise of coercion, as with warrants.

189. 318 U.S. 80 (1943) (*Chenery I*).

190. *Id.* at 89.

191. *Chenery I*, 318 U.S. at 87. In reviewing the SEC's action after remand, the Court later explained that

> a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis.

SEC v. Chenery Corp., 332 U.S. 194, 196 (1947) (*Chenery II*). The *Chenery I* Court arguably departed from precedent in refusing to consider rationales other than those appearing in the record. *See, e.g.*, Pacific States Box & Basket Co. v. White, 296 U.S. 176 (1935) (upholding the agency's proposed decision because it had a plausible relationship to a conceivable agency goal).

192. *Chenery II*, 332 U.S. at 199. Adversely affected parties may attack that new reasoning—as they did upon remand from *Chenery I*, albeit unsuccessfully—in the adjudicative hearing before the agency.

thereby preventing circumvention of the process benefits that arise from prior articulation.[193] Use restrictions under the Fourth Amendment would have similar attributes, requiring the use decision to be made in a politically visible, and—one hopes—more responsible, manner.[194] Judicial review of all proposed uses also serves to limit the potential for governmental overreaching. Thus, one method of cabining the delegation of policymaking authority to comparatively unaccountable agencies is to require that their justifications be continuous and thus subject to greater scrutiny.

Finally, imposing a requirement of continuous purposes would not unduly harm legitimate governmental initiatives. To protect its interests, the government merely must articulate its intended uses prior to seizure, either through regulations or policy circulars. Although courts have generally focused on a particular purpose in legitimating searches and seizures, the government need not rely on one objective only. For instance, police searching for evidence germane to one criminal investigation generally will also use any information uncovered in unrelated criminal investigations, much as in *Andrews*. Most people would find such combined objectives reasonable. Furthermore, if the government wishes to search a closely regulated industry for both administrative[195] and

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193. In contrast, judges do not limit themselves to previously articulated justifications in reviewing the work product of the legislature. Under rational basis review, courts will uphold challenged legislation if *any* rational purpose can be determined, whether articulated by counsel defending the statute or conceived by the judges themselves. United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 179 (1980) ("Where, as here, there are plausible reasons for Congress' action, our inquiry is at an end. It is, of course, 'constitutionally irrelevant whether this reasoning in fact underlay the legislative decision,' . . . because this Court has never insisted that a legislative body articulate its reasons for enacting a statute." (citation omitted)). In dissent, Justice Brennan argued that "[a] challenged classification may be sustained only if it is rationally related to achievement of an *actual* legitimate governmental purpose." *Id.* at 188 (Brennan, J., dissenting) (emphasis in original). Some commentators, as well as judges, have argued that rational basis review becomes a mere tautology if judges can supply the rationale justifying the decision. *E.g.*, Cass R. Sunstein, *Public Values, Private Interests, and the Equal Protection Clause*, 1982 SUP. CT. REV. 127, 134; Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L.J. 123, 128 (1972). The Supreme Court, however, has for the most part upheld legislation if any plausible purpose can be discerned. Presumably, electoral accountability serves as a substitute to monitor the product of the legislature.

194. *See supra* text accompanying notes 176-81.

195. The Supreme Court has long upheld the validity of searches undertaken pursuant to a general administrative scheme that limits the potential for arbitrary enforcement. In the same year that the Court decided *Katz* and *Hayden*, it held that searches of houses to determine compliance with a city housing code could be based on less than probable cause. Camara v. Municipal Court, 387 U.S. 523, 538-39 (1967). The Court acknowledged that "there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails." *Id.* at 536-37. Under the regulatory rationale, the Court has upheld warrantless searches of heavily regulated industries such as liquor stores, Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970), firearm dealers, United States v. Biswell, 406 U.S. 311 (1972), mines, Donovan v. Dewey, 452 U.S. 594 (1981), and auto junkyards, New York v. Burger, 482 U.S. 691 (1987). No warrant is required if the regulatory inspection scheme provides sufficient safeguards against arbitrary or indiscriminate use.

criminal law enforcement reasons, it need only make that intent known. Courts would then determine the reasonableness of the search and seizure based on the accommodation of competing interests. Courts might require reasonable suspicion to undertake the search, but then again they might not if indicia of bureaucratic regularity exist. At a minimum, courts would be forced to grapple with the full ramifications of an administrative search, which often includes a criminal law enforcement component, instead of pretending that the special regulatory rationale excuses any analysis of the criminal law enforcement dimension.[196]

What, however, if government policymakers wish to authorize a collateral use such as creation of a data bank after individual samples are already in the government's possession? On occasion, the government may devise a new use for information it legitimately maintains in its files.[197] But requiring the government to precommit to its use of seized information in the vast majority of cases accurately reflects the balance of interests between the state and individual after the seizure.[198] Thus, although the government's legitimate interests may be undervalued in rare situations, concern for confining governmental discretion and for protecting privacy justifies a categorical ban on previously undisclosed uses.[199]

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196. *See, e.g.*, *Burger*, 482 U.S. at 716 (upholding an administrative search of an automobile junkyard, despite the law enforcement objectives, because "[t]he discovery of evidence of crimes in the course of an otherwise proper administrative inspection does not render that search illegal or the administrative scheme suspect"); *see also supra* note 144 and accompanying text.

197. Although the government may legitimately retain some information in its files for historical or other reasons, its general interest in storing intimate information about an individual rarely outweighs the continuing privacy interests involved. A decision to maintain private information in governmental files solely on the chance that the information might become beneficial in the future unreasonably exposes the individual to loss of control over that information. The risk of further disclosure is considerable, and the mere fact of continued loss of control is unsettling. The government's continued possession of an individual's blood sample or diary may well be grounds for apprehension. Because individuals do not lose all privacy interest in information and property, even after seizure by the government, it is simply unreasonable for the government to retain information or property merely because of the prospect of future use.

198. Moreover, because individuals would probably have been unaware of the consequences of a seizure, they might have challenged the seizure more vigorously or might have taken action to avoid the seizure, such as changing jobs, had they realized those consequences.

199. To this point, I have assumed that the government's collateral use of the information does not itself constitute a seizure within the purview of the Fourth Amendment. The assumption is safe under contemporary Supreme Court doctrine. The Court, for instance, has never suggested that there are any constitutional underpinnings to the Privacy Act. The use of private information, however, effects a seizure in a sense by displacing an individual's control over private information. Indeed, the logic of *Katz* suggests that seizures should include governmental appropriations of intangible as well as tangible effects. The holding in *Skinner*, that analysis of blood and urine samples in the government's possession constitutes a separate search, provides some support for this view. Such an expansion of the scope of the Fourth Amendment would of course be controversial, for every governmental use of information implicating privacy rights, whether by the IRS or a police force, would then need to pass a constitutional hurdle of reasonableness. Nonetheless, this reconceptualization, by circumscribing each subsequent use with a requirement of reasonableness, would protect

IV. Implementing Use Restrictions Under the Fourth Amendment

Understanding the Fourth Amendment to include use restrictions should result in a more visible, straightforward accommodation between the privacy and governmental interests at stake in searches and seizures. In constructing the balance, courts must factor in the uses the government may make of the property or information seized. The government cannot employ the property or information for any use not considered in justifying the initial exercise of coercive force, unless the subsequent use would have itself legitimated the initial search.[200] Use restrictions ensure continuing fidelity to the accommodation reached. Incorporating use restrictions under the Fourth Amendment, however, would not—as discussed below—radically transform the current legal terrain.

A. Fingerprint and DNA Data Banks

Consider, first, the widely accepted practice of fingerprinting. Can governmental officials obtain and then store fingerprints for use in a national data bank to be used for criminal law enforcement purposes? The doctrinal answer to the question currently is yes, but only with a degree of circumlocution.[201] The Supreme Court, in *Davis v. Mississippi*[202] and *Hayes v. Florida*,[203] held that law enforcement officials generally cannot forcibly seize suspects for the purpose of obtaining a fingerprint, unless they have probable cause.[204] But once a suspect is in custody, then fingerprinting entails no further search—authorities may fingerprint the individual without any other demonstrated state interest. Indeed, the Supreme Court has recently scaled back what it considers a search or seizure in other contexts,[205] most likely to avoid triggering the warrant or probable cause requirements in situations that do not seem to involve

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individuals from governmental use of information obtained through conventionally understood seizures in a manner analogous to the proposals I have sketched above.

200. If the government, for instance, develops probable cause to believe that an individual—whose DNA is on file because of a paternity suit—committed a crime that produced DNA evidence, it may test that sample because it has the authority to acquire a sample directly.

201. *See, e.g.*, Thom v. New York Stock Exchange, 306 F. Supp. 1002, 1007 (S.D.N.Y. 1969) (upholding a statute that allows the state to retain fingerprints in a file after the use for which they were collected—to monitor employees in a heavily regulated industry—has ceased), *aff'd sub nom.* Miller v. New York Stock Exchange, 425 F.2d 1074 (2d Cir.), *cert. denied*, 398 U.S. 905 (1970).

202. 394 U.S. 721 (1969).

203. 470 U.S. 811 (1985).

204. If authorities today currently only need reasonable suspicion before stopping and frisking, it is not clear why any greater certainty should exist before stopping to fingerprint.

205. *See supra* note 3 and accompanying text; *see also* Richard H. McAdams, Note, *Tying Privacy in* Knotts*: Beeper Monitoring and Collective Fourth Amendment Rights*, 71 VA. L. REV. 297, 331-32 (1985) (critiquing the Court's conclusion that monitoring a suspect through the use of a "planted" beeper does not implicate Fourth Amendment interests).

serious intrusions.[206] Law enforcement authorities today routinely obtain the prints of all those passing through the criminal justice system. If fingerprinting is not considered a search,[207] then there would be no problem, at least under my proposal, in creating a data bank.

To someone unversed in criminal procedure, however, fingerprinting seems like a search—if not a very intrusive one—because it involves the exercise of governmental coercion and some loss of privacy and control over one's fingers and fingerprint code. Some courts have suggested that, even if fingerprinting constitutes a search, governmental authorities nonetheless can justify the search by relying on an administrative purpose—proving identity.[208] Individuals may have several aliases, and fingerprints can help establish identity.

Assuming that fingerprinting constitutes a search, the critical question would be whether that information can be stored in a data bank for use in future law enforcement investigations, even if there is a valid administrative or law enforcement justification for obtaining the prints initially. Under the analysis suggested in this Article, individuals do not lose their privacy interest in such information merely because the government first obtained the prints for a valid purpose. Rather, courts should confront the question of whether the prospective law enforcement use, which is well known as official police policy today—in conjunction with the administrative or law enforcement objective of establishing identity—satisfies the reasonableness requirement of the Fourth Amendment.

The governmental interests are clear. Fingerprinting has long been a useful tool in revealing a person's identity and in establishing the presence of a suspect at a crime scene. In comparison, the privacy interest is less tangible. To some, any use of identifiers, such as Social Security numbers,

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206. Adopting use restrictions admittedly might provide further incentive for courts to conclude that particular governmental actions do not constitute searches or seizures. On the other hand, a use restriction might also convince a judge that governmental conduct constitutes a reasonable search and seizure in light of the protection. Similarly, the availability of a protective order in discovery may convince a judge to find fewer issues subject to absolute privilege. Thus, it is difficult to predict with certainty whether judges would permit fewer or greater searches and seizures in light of use restrictions.

207. Courts have hesitated in finding that fingerprinting entails a search because of a fear that authorities might need to procure a warrant prior to fingerprinting. *See* Davis v. Mississippi, 394 U.S. 721, 727 (1969) (recognizing, in dicta, that fingerprinting may be so noninvasive as to be allowable in certain situations even absent traditional probable cause). If all searches must be based on probable cause and a warrant must be obtained, then fingerprinting as a law enforcement tool would lose much of its utility. Some commentators have recently recommended jettisoning the warrant requirement, Amar, *supra* note 28, at 762; TAYLOR, *supra* note 37, at 46-49, 68-71. Furthermore, the expansion of the special needs requirement suggests that courts are moving in that direction. *See supra* note 142.

208. *See, e.g.*, United States v. Laub Baking Co., 283 F. Supp. 217, 222-25 (N.D. Ohio 1968) (distinguishing the identification uses of fingerprints from evidentiary uses). The same would presumably hold true for photographs. *Cf.* Cupp v. Murphy, 412 U.S. 291 (1973) (finding no search when police took scrapings from under the fingernails of someone already in custody).

raises privacy concerns.[209] To others, the privacy concern arises because of the greater likelihood of governmental surveillance or investigation in case of a possible computer match. The more personal information stored in the government's computers, the more restrictive the realm of personal privacy. As Alexander Solzhenitsyn's character in *Cancer Ward* laments:

> As every man goes through life he fills in a number of forms for the record . . . . A man's answer to one question on one form becomes a little thread, permanently connecting him to the local center of personnel records administration. There are thus hundreds of little threads radiating from every man. . . . They are not visible, they are not material, but every man is constantly aware of their existence.[210]

Despite the privacy concerns, however, I think most people today would find the future law enforcement use of fingerprints reasonable. The state arguably can demonstrate significant law enforcement interests in comparison to the limited personal information disclosed by fingerprints (identification) and the limited intrusion into bodily autonomy (soiled fingers and a brief delay).

The DNA data bank issue should be resolved in a comparable fashion, even though the efficacy of the data bank in detecting and deterring crime is as of yet unproven.[211] Unlike taking fingerprints, however, there is no question that the extraction of blood and its subsequent analysis constitute searches under current doctrine.[212] In addition to the privacy interest implicated by physical extraction of the blood, the subsequent analysis of a blood sample for the identifying DNA characteristics constitutes an invasion into one's control over personal information not generally revealed to the public. The DNA print may ultimately contain vastly more information than a fingerprint, including the presence of

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209. *See* COLIN J. BENNETT, REGULATING PRIVACY: DATA PROTECTION AND PUBLIC POLICY IN EUROPE AND THE UNITED STATES 46-51 (1992) (recounting plans for and reaction to the use of centralized data banks and personal identification numbers in several countries); FLAHERTY, *supra* note 18, at 344-58 (discussing proposals for matching computer data from several governmental agencies); Shattuck, *supra* note 18, at 1004 ("Franz Kafka would feel quite at home in the [contemporary] world of computer-matching, national identification systems, and other . . . instruments of privacy invasion."). If there is no cognizable privacy interest, then use restrictions would not apply.

210. George J. Annas, *Privacy Rules for DNA Databanks*, 270 JAMA 2346, 2347 (1993) (quoting ALEXANDER I. SOLZHENITSYN, CANCER WARD 192 (Nicholas Bethell & David Burg trans., 1969)).

211. Only a few individuals nationwide have been implicated in criminal activity because of data banks. *See* Jay Hamburg, *DNA Bank Cashes in on Felons*, ORLANDO SENTINEL, Feb. 15, 1993, *available in* LEXIS, News Library, ORSENT File (discussing several states' recent establishment of DNA data banks and noting that Florida's DNA data bank has not yet led to a conviction). The cost of such data banks is substantial. *See* Ted Appel, *Lungren Links Crime to Economic Problems*, UPI, May 17, 1993, *available in* LEXIS, News Library, UPSTAT File (reporting that, because of funding problems, California had yet to start testing the over 30,000 samples on file).

212. *See supra* note 66.

genetic defects, predisposition to diseases,[213] and perhaps even sexual orientation.[214] Currently, state officials do not learn the genetic makeup of an individual in recording the DNA print, but the potential for such knowledge undoubtedly exists.[215] Even if statutes place controls on dissemination of the DNA prints, the risk of disclosure cannot be discounted.

The critical inquiry, therefore, is whether the governmental objective in creating a DNA data bank justifies the possible intrusion into privacy. In upholding the establishment of a DNA data bank for felons, the Fourth Circuit in *Jones v. Murray*[216] openly balanced the government's interest in deterring and detecting future crime against the privacy interests involved. The court conceded that the state could not meet a probable-cause or even individualized-suspicion standard.[217] Nevertheless, it concluded that the governmental interest in establishing a DNA data bank eclipsed the interests of the individuals to be tested, primarily because they were felons.[218] Although one can disagree with the results of that balance,[219] the court asked the appropriate question and did not dodge it by ignoring the use sought by the government. To the court, the state's acquisition and use of the data for future law enforcement purposes was consistent with the reasonableness requirement in the Fourth Amendment.

If the state attempted to include DNA prints obtained from blood tests of those involved in all traffic accidents, however, the court's conclusion

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213. *See, e.g.*, Edward G. Burley, Note, *A Study in Scarlet: Criminal DNA Typing Reaches the Courts and Legislatures*, 6 J.L. & POLITICS 755, 762 (1990) (giving examples of the many diseases that DNA evidence has determined to be genetic). Researchers now believe DNA evidence reveals predisposition to cancer. *See* National Advisory Council for Human Genome Research, Nat'l Insts. of Health, *Statement on Use of DNA Testing for Presymptomatic Identification of Cancer Risk*, 271 JAMA 785, 785 (1994) ("Recent advances in the genetics of cancer have raised the possibility of widespread DNA testing for the detection of predisposition to cancer.").

214. Some researchers believe that they have isolated a gene showing disposition to homosexuality. *See* Rhonda Hillbery, *The Household Issue: Scholars Say "Genetic Predisposition" Doesn't Dictate the Form of the Family*, STAR TRIB. (Minneapolis/St. Paul), May 1, 1994, at 1A, 15A.

215. *See* Annas, *supra* note 210, at 2347-48. In any event, governmental authorities retain blood samples, so some risk of ultimate disclosure exists. Private biotechnology companies may be eager to acquire such samples. *Cf.* Susan Watts, *The Genetic Goldrush; the Genes in Your Body Couldn't Possibly Belong to Someone Else . . . Could They?*, THE INDEPENDENT (London), Apr. 27, 1994, at 21 (reporting that an American biotechnology company is negotiating to purchase a DNA data bank in France for research purposes).

216. 962 F.2d 302 (4th Cir.), *cert. denied*, 113 S. Ct. 472 (1992).

217. *Id.* at 306-07.

218. *Id.* at 307; *see also* Rise v. Oregon, 59 F.3d 1556 (9th Cir. 1995) (upholding the creation and maintenance of a data bank in light of the limited privacy right enjoyed by felons covered by the statute); State v. Olivas, 856 P.2d 1076 (Wash. 1993) (Utter, J., concurring) (arguing that taking blood for DNA data bank purposes was constitutional as to "convicted sex and violent offenders").

219. *See, e.g.*, *Jones*, 962 F.2d at 313 (Murnaghan, J., concurring and dissenting) (arguing that DNA testing of nonviolent felons is unconstitutional).

would probably change.[220] The court would likely give greater weight to the privacy interest enjoyed by the drivers who may never have been convicted of any crime and less weight to the government's interest in keeping track of such drivers, who will be less likely than convicted felons to commit violent felonies that produce DNA evidence. The fact that the government legitimately obtained the sample because of the traffic accident should be irrelevant, just as the possibility that prison authorities can obtain blood samples to screen for venereal disease or AIDS should not be determinative. Rather, the government's planned use of the blood sample must pass the Fourth Amendment hurdle in light of the additional privacy concerns raised.[221]

Finally, the government's acquisition of a blood sample from the felon or the driver does not entitle the government to publicize any information uncovered, whether to the press or private insurance companies. Because analysis of DNA can reveal unquestionably intimate information, the individual's interest in confidentiality is apparent. Such governmental use of information legitimately seized would breach the reasonableness requirement under the Fourth Amendment.

B. School Searches

Assume that school officials promulgate a policy authorizing random searches of lockers. They defend the policy on the ground of a nascent roach problem. They have also promulgated a rule forbidding any food to remain in the lockers past lunch time. Pursuant to a random search one Wednesday evening, officials find an odiferous herring sandwich in Locker A, two Rolex watches in Locker B, and a gun in Locker C. Should the Fourth Amendment constrain school officials' use of the items seized?

The first question to resolve, as with the data bank hypotheticals, is whether the inspection of the lockers constitutes a search within the meaning of the Fourth Amendment. I assume that it does, and most state courts that have addressed the issue have so held.[222] I also assume that

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220. *See, e.g.*, Schmerber v. California, 384 U.S. 757, 772, 770-72 (1966) (holding that warrantless blood tests for those involved in traffic accidents are constitutional "under stringently limited conditions" and noting that this holding "in no way indicates that [the Constitution] permits . . . intrusions under other conditions").

221. Federal military authorities now plan to enter the DNA code of all enlisted personnel for identification reasons. *See DNA May Eliminate "Unknown Soldier,"* ST. LOUIS POST-DISPATCH, Aug. 8, 1993, at 11D (discussing the use of DNA for identification purposes at the U.S. Naval Academy). Once the DNA code and blood samples are on file, the military may well be tempted to use that information for law enforcement purposes or perhaps even for health or insurance research.

222. *See, e.g., In re* William G., 709 P.2d 1287, 1291 (Cal. 1985) (holding that school officials' searches of lockers implicate the Fourth Amendment); State *ex rel.* T.L.O. v. Engerud, 463 A.2d 934 (N.J. 1983) (recognizing a reasonable expectation of privacy in the absence of a school policy of regularly searching lockers). *But cf. Ex rel.* Isiah B. v. State, 500 N.W.2d 637, 641 (Wis.) (upholding

the Supreme Court would uphold the search under some variant of the special needs[223] and administrative[224] search theories. The Court might balk if school officials only targeted the lockers of students whom police officials indicated were suspected of criminal activity,[225] but otherwise the search would be upheld.

But, under my approach, legitimating the search should not end the inquiry. While it is certainly reasonable for the officials to seize and hopefully dispose of the herring sandwich, the Rolex watches pose a different problem. Under current doctrine, school officials cannot seize the watches unless they have probable cause to believe that the watches are contraband, fruits, or evidence of a crime.[226] My guess is that officials may have a hunch that the watches were stolen, but not probable cause.

Nonetheless, can school officials contact police and share with them their suspicions about the student? The first part of my answer hinges on whether school officials have articulated a policy that they will convey, or at least have the discretion to convey, any evidence that they uncover relevant to criminal law enforcement to the proper authorities. Some school districts have done just that.[227] The second part, however, is more difficult. Is an administrative or special-needs search still reasonable if one of the objectives is to aid law enforcement? Although a difference of opinion undoubtedly exists, my guess is that most would find such collateral use reasonable, though some no doubt would insist that there first be individualized suspicion before undertaking a locker search whose fruits can be used for criminal law enforcement.

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random locker searches because the school had adopted and publicized a policy of retaining control of lockers, so that students could have no reasonable expectation of privacy with regard to locker contents), *cert. denied*, 114 S. Ct. 231 (1993).

223. *See supra* note 142.

224. *See supra* note 195.

225. Courts have recognized the problem of pretextual administrative or special needs searches that are made by police investigating a crime. *See, e.g.*, United States v. Giannetta, 909 F.2d 571, 581 (1st Cir. 1990) (declaring that probation and parole officers "may not serve as 'stalking horses' for the police by initiating searches solely for police purposes in order to help the police circumvent the fourth amendment's warrant requirements"); *Ex rel.* F.P. v. State, 528 So. 2d 1253, 1254-55 (Fla. Dist. Ct. App. 1988) (invalidating a search of a student because the search was carried out at the behest of police); Michigan v. Clifford, 464 U.S. 287, 294-95 (1984) (declaring that administrative warrants will suffice only when the search is made for a purpose other than a criminal investigation, such as determining the origin of a recent fire); *see also supra* note 144.

226. Some might believe, however, that the plain view doctrine should permit authorities to seize any items that *may* be evidence of a crime. *See* Arizona v. Hicks, 480 U.S. 321, 336 (1987) (O'Connor, J., dissenting) (arguing that probable cause should not be required to seize an item in plain view).

227. *See, e.g.*, Sandra Barbier, *Board Approves School Car Searches*, TIMES-PICAYUNE (New Orleans), July 12, 1994, at B2 ("The policy states that 'by entering School Board property, the person in charge of any vehicle consents to [a] search of the entire vehicle and its contents, with cause, by school officials or police officers.'").

In any event, the legitimacy of the search should not privilege school authorities to inventory every item in the lockers and print the list in a school newspaper. Assuming that society holds there to be a legitimate expectation of privacy in one's locker, then school officials breach that expectation by publicizing the lockers' contents, even if they can search the lockers for rancid food. Students have some privacy interest in not having school authorities rummage through their stuff for moldy cupcakes, but quite another in not having a list of books, comics, clothes, or deodorants bandied about in the press. The school authorities' dissemination of information gleaned from the search must withstand the test of reasonableness.

What then of the gun? There is no legitimate expectation of privacy in contraband,[228] and hence school officials can confiscate the gun irrespective of whether law enforcement officials could have searched the locker directly. A policy of seizing all contraband disclosed in an otherwise legitimate search would be deemed reasonable.

In short, use restrictions unquestionably would hinder governmental authorities' efforts to establish data banks and to share information with other governmental agencies and private parties. At a minimum, governmental officials would have to enact policies governing permissible collateral uses. But the use restrictions, while protecting individuals' control over private information, would not directly impede the government's ability to seize items connected with ongoing criminal investigations or regulatory programs.

V. Conclusion

The government uses information in its possession to further the public interest in a variety of ways. Information can lubricate the machinery of responsible governance. Governmental officials alert individuals to health risks, make medical and scientific discoveries that improve many of our lives, and protect us from those who would harm us.

Yet governmental accumulation of information threatens individuals' control over their privacy. Information concerning a person's health, employment experience, finances, and even video preferences have found their way into governmental files. The problem of accommodating the government's legitimate interests in acquiring more information with the individual's right of control over personal privacy is daunting, and has confounded lawmakers and civil libertarians alike. Legislators have forged

228. *E.g.*, TEX. PENAL CODE ANN. § 46.03(a)(1) (Vernon 1994) (prohibiting gun possession on school premises). The federal ban on gun possession on school premises was recently invalidated because its enactment exceeded Congress's power under the Commerce Clause. United States v. Lopez, 115 S. Ct. 1624, 1631 (1995).

compromises in passing broad policy measures such as the Privacy Act, in authorizing criminal and civil law enforcement initiatives through wiretapping and computer matching, and in regulating the health and safety of citizens.

Coerced acquisition of information from individuals forms one subset of the overall problem. When the government can only obtain information through the coercion implicit in a search or seizure, legislative accommodation is insufficient because of the more direct threat to individual autonomy raised by use of government force. The Fourth Amendment regulates both the government's acquisition and subsequent use of information. Disenchantment with the rights afforded the criminally accused should not blot out concern for the privacy of all citizens.

Use restrictions flow directly from the Fourth Amendment's protection for privacy. With the abandonment of the property paradigm during the Warren Court era, the government can seize information and property even when it does not enjoy a superior property interest. The legitimacy of the seizure hinges instead on the purposes for which the government will use the items and information, whether for criminal law enforcement or for some regulatory end. Governmental authorities thus can only use the items seized consistent with the purposes justifying the seizure.

In the absence of such strictures, the privacy rights of individuals might be unjustifiably trammelled, for privacy is implicated as much by what the government does with information as by the seizure itself. Moreover, if a requirement of continuous purposes did not circumscribe governmental authorities, officials could unilaterally decide upon disposition of property and information previously seized, without any need to justify their possible intrusion into privacy or property rights by reference to a pressing governmental objective. A continuity requirement imposes restraints on administrative officers who otherwise are not directly accountable for their decisions. Thus, just as authorities now routinely return property seized after its relevance to criminal proceedings has ceased, so they should restrict the use of private information seized after the purposes for which it was obtained have ended. Recognizing use restrictions under the Fourth Amendment encourages greater debate over the accommodation between the government's need to know and the individual's right to be let alone.